LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted] 38

POLAR ICE CREAM & CREAMERY COMPANY,
APPELLANT,

vs.

CHARLES O. ANDREWS, JR., ETC., ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

FILED NOVEMBER 19, 1963
PROBABLE JURISDICTION NOTED MARCH 18, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 601

POLAR ICE CREAM & CREAMERY COMPANY,
APPELLANT,

vs.

CHARLES O. ANDREWS, JR., ETC., ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division		
Complaint filed January 5, 1962	2	1
Exhibit "A"—Letter from Florida Milk Commission to "All Producers, Producer-Distributors and Distributors Pensacola Milk Marketing Area," sent on November 22, 1961	11	11
Exhibit "B"—Letter from Florida Milk Commission to "All Producers, and Producer-Distributors Pensacola Milk Marketing Area," dated November 30, 1961	12	12
Exhibit "C"—Letter from Florida Milk Commission to "All Distributors, Producer-Distributors and Bobtail Distributors—Pensacola Milk Marketing Area," dated December 1, 1961	13	13

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 24, 1963

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Complaint filed January 5, 1962—Continued		
Exhibit "D"—Letter from Florida Milk Commission to Polar Ice Cream and Creamery, dated December 20, 1961 with enclosure of copy of Military Milk Order	14	14
Exhibit "E"—Contract DA-09-038-AIII-2032 between Polar Ice Cream and Fort Benning, Ga. (excerpt)	18	20
Exhibit "F"—Contract AF 08(637)-1169 between Polar Ice Cream and Tyndall AFB, Florida and approval	20	23
Exhibit "G"—Contract AF 08(620)-406 between Polar Ice Cream and Eglin AF Auxiliary Field #9, Florida and approval	21	26
Exhibit "H"—Contract N61331s-1092 between Polar Ice Cream and U.S. Navy Mine Defense Laboratory	23	30
Temporary restraining order, January 9, 1962	24	32
Amended complaint, February 9, 1962	27	34
Exhibit "I"—Letter from Florida Milk Commission to Mr. J. F. Zirklebach, Pensacola, Florida, dated January 24, 1962 with list of Producer Payments Due For November and December 1961	38	42
Exhibit "J"—Reply letter from President, Polar Ice Cream to Mr. E. V. Fisher, Administrator, Florida Milk Commission	41	45
Exhibit "K"—Letter from Attorney for Florida Milk Commission to Mr. J. F. W. Zirkelbach, dated January 31, 1962 quoting excerpt of the minutes of the last meeting of the Florida Milk Commission	42	46
Exhibit "L"—Letter from Florida Milk Commission to Polar Ice Cream giving a list of the 1962 Base Per Cent	44	48

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Amended complaint, February 9, 1962—Continued		
Exhibit "M"—Official Order PEN-2 of the State of Florida Milk Commission, Tallahassee—In The Matter of Continuing Earned Bases and Reallocating Portions of the Earned Bases, Under Certain Conditions, In the Pensacola Milk Marketing Area, December 13, 1961	45	49
Exhibit "N"—Official Order PEN-3 of the State of Florida Milk Commission, Tallahassee—In the Matter of and Relating To Maximum Charges For Handling and Maximum Rates for Hauling Milk In The State of Florida, Pensacola Milk Marketing Area, December 13, 1961	48	53
Exhibit "O"—Official Order PEN-4 of the State of Florida Milk Commission, Tallahassee—In The Matter of Establishing and Fixing Minimum Prices To Be Paid Producers For Milk In The Pensacola Milk Marketing Area, January 18, 1962	52	58
Exhibit "P"—Official Order No. 20-28 of The State of Florida Milk Commission, Tallahassee, In The Matter Of Amending Official Order No. 20-25, Defining Classes of Milk In The State of Florida, January 17, 1962	54	61
Exhibit "Q"—Official Order No. 20-29 of The State of Florida Milk Commission, Tallahassee, In The Matter of Establishing and Fixing Minimum Prices To Be Paid Producers For Milk In All of The Milk Marketing Areas of The Florida Milk Commission, January 18, 1962	57	64
Exhibit "R"—Excerpt from Fluid Milk and Cream Report, January 16, 1962, prepared by the United States Department of Agriculture	59	69

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Amended complaint, February 9, 1962—Continued		
Exhibit "S"—Dow Jones News Service excerpt entitled "Dairy Surpluses Increase"	61	72
Exhibit "T"—Commodity News Service excerpt entitled "Government Dairy Purchases"	62	73
Temporary restraining order, February 21, 1962	63	75
Pre-trial order	67	77
Plaintiff's pleadings filed in compliance with pre-trial order	69	78
Defendant's pleadings filed in compliance with pre-trial order	79	87
Motion of defendants to dismiss	80	88
Motion of defendants to strike	81	88
Answer of the defendants	82	89
Transcript of the proceedings on March 12, 1962	87	94
Appearances	88	94
Colloquy between court and counsel re: issues involved	89	95
Opening statement for plaintiff by Mr. Harrell and Court's remarks	90	95
Opening statement for defendant by Mr. Horne and Court's remarks	99	99
Testimony of J. F. W. Zirkelbach—		
direct	154	123
cross	175	132
redirect	198	142
Mr. E. V. Fisher—		
direct	200	143
examination by Mr. Horne	214	149
direct	218	151
Theodore C. Jacoby—		
direct	219	151
E. V. Fisher— (resumed)—		
direct	225	154
examination by Mr. Horne	228	155
Plaintiff rests	230	156

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Transcript of the proceedings on March 12, 1962—Continued		
Defendant rests	232	157
Closing argument for plaintiff by Mr. McClain	235	158
Closing argument for plaintiff by Mr. Harrell	249	164
Closing argument for defendant by Mr. Horne	258	168
Motions to strike and to dismiss withdrawn	283	179
Closing argument for plaintiff by Mr. McClain	284	179
Reporter's certificate (omitted in printing)	289	181
Opinion and Findings of Facts and Conclusions of Law, Carswell, J.	291	181
Final judgment	300	189
Notice of appeal to the Supreme Court of the United States	302	190
Clerk's certificate (omitted in printing)	308	193
Plaintiff's Exhibits:	309	193
No. 1—Contract No. DA 09-038-AIII-2032 between Polar Ice Cream and Fort Benning, Georgia, date issued January 16, 1961	309	193
No. 2—Contract No. AF08(637)-1169 between Polar Ice Cream and Tyndall Air Force Base, Florida issued April 14, 1961	342	243
No. 3—Letters, etc, showing exclusive jurisdiction of United States over military establishments	392	294
Letter from Headquarters Naval Air Basic Training Command to Mr. Joe J. Harrell, dated March 9, 1962	392	294
Letter from U.S. Army Engineer District, Savannah to Mr. Joe Harrell, dated March 1, 1962	393	295
Transmittal letter from C. L. Clark, Executive Assistant to Governor Fuller Warren of State of Florida, dated December 4, 1952	394	296
Letter of acceptance from Secretary of War, Henry L. Stimson to Governor of Florida, Spessard L. Holland, dated February 1, 1943	395	297

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Plaintiff's Exhibits:—Continued		
No. 3—Letters, etc, showing exclusive jurisdiction of United States over military establishments—Continued		
Letter from Tyndall Air Force Base to Jones & Harrell, dated March 8, 1962	396	298
Deed of Cession of certain lands situated in the County of Okaloosa, State of Florida, dated April 26, 1937 with Secretary of State of Florida's certificate	397	299
Deed of Cession of a tract of land situated in the County of Okaloosa, State of Florida, Known as Eglin Field, dated January 12, 1951, with Secretary of State of Florida's certificate	401	302
Letter from Joe J. Harrell to Clerk, U.S.D.C., dated May 3, 1962	408	310
Letter from Mallory E. Horne to Mr. Joe J. Harrell, dated April 30, 1962	409	311
Affidavit of Joe J. Harrell as to papers on file	410	312
Transmittal letter from C. L. Clark, Executive Assistant to Governor Fuller Warren of State of Florida, dated December 4, 1952 (copy) (omitted in printing)	411	312
Letter of acceptance from Secretary of War, Henry L. Stimson to Governor of Florida, Spessard L. Holland, dated February 1, 1943 (copy) (omitted in printing)	412	312
Secretary of State of Florida's certificate	413	312
Secretary of State of Georgia's certificate to attached copy of Act No. 851 (Senate Bill No. 265) approved by the Governor on February 15, 1952 entitled "State Jurisdiction Over Ceded Territory"	414	313

	Original	Print
Record from the United States District Court for the Northern District of Florida, Tallahassee Division—Continued		
Plaintiff's Exhibits—Continued		
No. 3—Letters, etc. showing exclusive jurisdiction of United States over military establishments—Continued		
Secretary of State of Georgia's certificate to attached copy of Act No. 373 approved by the Governor on August 20, 1927, entitled "U.S. Government, Jurisdiction Ceded To"	417	316
Deed of Cession covering certain lands in the County of Bay, State of Florida, recorded on the eleventh day of January, 1943 with Secretary of State of Florida's certificate	420	318
Order noting probable jurisdiction	433	336

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil No. 851

POLAR ICE CREAM & CREAMERY COMPANY, Plaintiff,

vs.

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida, Defendants.

COMPLAINT—Filed January 5, 1962

Comes Now the Plaintiff, Polar Ice Cream & Creamery Company, and sues the Defendants as above set forth herein and alleges:

1. That Polar Ice Cream & Creamery Company is a Florida corporation, with its principal office and plant being located in Pensacola, Escambia County, Florida. The Defendant, Florida Milk Commission, is an instrumentality of the State of Florida, being created by Chapter 501, Florida Statutes; that the Plaintiff is a licensed milk distributor as defined in Chapter 501, Florida Statutes.

2. That the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution and Laws of the United States.

3. That on November 22, 1961, a letter was sent to the Plaintiff by E. V. Fisher, Administrator of Florida Milk Commission, setting forth, among other things, that as of November 22, 1961,

"All regulations of this Commission applicable to the Pensacola Milk Marketing Area are effective."

The letter further stated that pursuant to a vote of the producers and producer-distributors of the Pensacola Milk Marketing Area, a favorable vote was obtained which carried in favor of the Commission exercising its supervisory powers within the Pensacola Milk Marketing Area in accordance with Chapter 501, Florida Statutes. A copy of said letter is attached hereto, Marked Exhibit "A", and made a part hereof.

4. That thereafter, the Plaintiff received a letter from E. V. Fisher, stating that each producer and producer-distributor within the State must secure from the Com- [fol. 3] mission an annual permit to engage in business. A copy of said letter is attached hereto, marked Exhibit "B", and made a part hereof.

5. The Plaintiff received a letter from E. V. Fisher, Administrator, dated 1 December 1961, setting forth the requirement of a licensee in order to act as a milk distributor. A copy of said letter is attached hereto, marked Exhibit "C", and made a part hereof.

6. The Plaintiff received a letter from E. V. Fisher, Administrator, dated December 20, 1961, as follows:

"20 December 1961

File: 1.3.11.7

Polar Ice Cream and Creamery
Pensacola, Florida

Gentlemen:

The Florida Milk Commission, at its meeting on December 13, 1961, held in Jacksonville, Florida, adopted the Military Milk Order presently existing in the Northeast Florida Area, a copy of which is enclosed. The Commission agreed to recognize all existing military contracts now held by distributors in the Pensacola Area, provided a copy of these contracts was filed with this office within the next thirty (30) day period.

We shall appreciate having a copy of each existing contract in order to comply with the Commission's action.

If there is any question, please do not hesitate to contact us.

Very truly yours,

/s/ E. V. Fisher
E. V. Fisher
Administrator"

EVF:dn

A copy of said letter, together with the Official Order No. NEF-15, is attached hereto, marked Exhibit "D", and made a part hereof.

7. The Plaintiff, long prior to November 22, 1961, had supplied milk and other dairy products to Fort Benning, Georgia, pursuant to Contract #DA 09-038-AIII-2032. A copy of said contract award is attached hereto, Marked Exhibit "E" and made a part hereof.

8. That the Plaintiff, by contract dated May 25, 1961, and approved 2 June 1961, supplied milk and other dairy products to Tyndall Air Force Base, Florida, a copy of said contract award and contract approval being attached hereto, marked Exhibit "F", and made a part hereof.

[fol. 4] 9. That on December 6, 1961, the Plaintiff entered a bid on a contract to supply milk and other dairy products to Eglin Air Force Auxiliary Field #9, and said contract was awarded to Plaintiff and approved 27 December 1961. A copy of said bid and award being attached hereto, marked Exhibit "G", and made a part hereof.

10. That on June 22, 1961, the Plaintiff was awarded a contract for the furnishing of certain milk and dairy products to the U. S. Navy Mine Defense Laboratory, Panama City, Florida, a copy of the award being attached hereto, marked Exhibit "H", and made a part hereof.

11. That the aggregate sum involved in all of said contracts is $1,563,564.78.

12. That each of said military establishments heretofore described was acquired by the United States of America pursuant to Article I, Section 8, Clause 17 of the Constitution of the United States, which declares the Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . . " The United States of America has exclusive jurisdiction over each of said military establishments which were established in accordance with the foregoing Constitutional provision, or was otherwise acquired for due constitutional purpose by the United States of America.

13. Official Order #NEF-15 of the Florida Milk Commission (Exhibit "D") requires a distributor holding a military contract to first utilize all of the surplus milk available to him within the market before that distributor may procure milk from without the market for such use. The Order further provides that each distributor release his surplus milk for transfer or diversion to another distributor when such will result in a higher net return to distributor's producers. "Surplus milk" in the Order is defined as being all milk of any distributor not needed to fulfill that distributor's Class I requirements, and, in any event means any milk of any distributor in excess of 110% of that distributor's Class I requirements at any time.

14. The Order further provides that a minimum of [fol. 5] 40¢ per gallon shall be paid for milk testing 3.5% or less in butterfat, when the contract bid price for all estimated quantities called for under the contract averages 55¢ per gallon or less. The Order further provides that in event the contract bid price exceeds 55¢ per gallon, as computed above, the producers shall receive one-half (½) of that amount in addition to the minimum price of 40¢ per gallon.

14-A. That Plaintiff for a long time has been able to supply its requirements for milk at a price much less than

the price of 40¢ per gallon for milk testing 3.5% or less in butterfat, plus the additional price as computed in the Official Order NEF-15 of the Florida Milk Commission. For example, on January 2, 1962, the Plaintiff purchased from Blackbelt Dairies, Inc. 4,250 gallons of fluid milk testing 4.3% butterfat for 34.04 cents per gallon for 3½% milk and on Wednesday, January 3, 1962, the Plaintiff purchased from Blackbelt Dairies, Inc. 4,250 gallons of milk testing 4.1% butterfat at 34.04 cents per gallon for 3½% milk. It thus becomes apparent that if the Plaintiff is required to purchase milk in accordance with the Order above described, it will be irreparably injured, and the obligations of its contracts as heretofore described will be impaired, all in violation of the Constitution of the United States.

15. That the Plaintiff for the six month period beginning April 1, 1961, and ending September 30, 1961, purchased milk in the gallons and prices indicated from the following milk cooperative associations, to-wit:

Tri-State Milk Producers Association, Bristol, Virginia, $16,410.41 at average price of 33.54 cents per gallon for 3½% milk.

Black-belt Dairies, Demopolis, Alabama, $220,575.67 at average price 32.25 cents per gallon for 3½% milk.

Central Arkansas Milk Producers Association, Little Rock, Arkansas, $222,126.96 at average price of 30.80 cents per gallon for 3½% milk.

16. More than twice the amount of milk used in the Pensacola Milk Marketing Area, as defined and constituted under the Order of the Milk Commission, Exhibit "D", is purchased from outside the State of Florida, and said milk is an item in Interstate Commerce. The gallons of milk handled, together with the designation of firms purchasing the same showing out-of-State milk purchases and Florida milk purchases for the month of November, 1961, is as follows:

[fol. 6]

	Out of State Milk	Florida Milk
Barber Pure Milk Company, Montgomery, Alabama	56267	
Fairhope Ice Cream & Creamery Co., Fairhope, Alabama	8721	
Woodhaven Dairy, Robertsdale, Alabama	14781	
Turner Dairies, Anniston, Alabama	61174	
Pensacola Dairy Company, Pensacola, Florida	6466	11566
Bordens Dairy, Pensacola, Florida	169345	129545
Polar Ice Cream Company,	230292	92592
Total	547046	233703

17. Florida Statutes 501.13 (8) is as follows:

"It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this Chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful."

That this portion of the Statute is virtually identical to the New York Statute which was held invalid by the Supreme Court of the United States as violating the Federal Commerce clause of the United States Constitution. *Baldwin vs. Seelig,* 294 U.S. 511; 79 Law Ed. 1032; 55 Supreme Ct. 497.

18. That Florida Statutes 501.09, Subparagraph (4) (b) provides as follows:

> "For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed with the commission as provided by this chapter."

[fol. 7] 19. That Plaintiff has been informed by the Auditing Department of the Defendant that they desire an audit of his books in order to compute the tax which Defendants contend is due and payable by the Plaintiff under said section and Plaintiff has been informed by Florida authorities that all milk processed in the State of Florida, whether for military or civilian consumption is subject to said tax.

20. There is a penalty contained in 501.23, Florida Statutes, which is as follows:

> "Penalty for violations.—A violation of any provision of this chapter or of any rule or order of the commission lawfully made, except as otherwise expressly provided by this chapter, shall be a misdemeanor punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, and each day during which such violation shall continue shall be deemed a separate violation."

21. Likewise, under the provisions of 501.09, Florida Statutes, the Plaintiff's license to handle milk can be revoked by the Commission.

22. The State of Florida, under its police power, has exercised the same in order to insure its inhabitants of having wholesome milk and dairy products by the enactment of Chapter 502, Florida Statutes, in which milk

produced both within and without the State of Florida is made the subject of sanitary regulations under the power and control of the Commissioner of Agriculture. Sections 502.03 and 502.12 specifically provide sanitary regulations pertaining to milk produced outside the State of Florida. It is therefore altogether too apparent that the provisions of Chapter 501, Florida Statutes, are not needed, nor are the provisions contained therein necessary within the police power of the State of Florida in order to protect the health of her citizens from an unwholesome product being foisted upon them. This, therefore, leads to the inescapable conclusion that the sole purpose of Chapter 501 is to create a position of economic isolation for the milk producers of the State of Florida and to isolate Florida milk producers from the legitimate competition of milk producers located in states other than the State of Florida.

23. The purpose of Chapter 501 is to promote the economic advantages of Florida milk producers by curtailment of out-of-state producers and burdening of interstate commerce, all in violation of the Commerce Clause of the United States' Constitution, Article I, Section 8, and also [fol. 8] in violation of Article IV, Section 2, the Privilege and Immunities Clause of the Federal Constitution, and the Order heretofore described, issued pursuant to the authority granted the Florida Milk Commission by Chapter 501, Florida Statutes, clearly impairs the obligation of the existing contracts heretofore described in this Complaint, all in violation of Article I, Section 10, of the Constitution of the United States, and is a violation of Article I, Section 8, Clause 17, of the Constitution of the United States.

24. That for more than twenty (20) years, the Plaintiff has worked untiringly to develop a proper source of supply of milk from both producers within and without the State of Florida, and because of its business relationship with the various producers located throughout the United States, the Plaintiff has been able to bid successfully on a number of military contracts, and for the past eight (8) years the Plaintiff, on a competitive bid basis, has been

able to secure the contract for the supply of milk and dairy products to Fort Benning, Georgia, each of said contracts amounting to over $1,000,000.00, and the Government of the United States was thus saved literally thousands of dollars because of the bidding of the Plaintiff, but if the Order above complained of and Chapter 501, Florida Statutes, are allowed to remain in full force and effect and are not declared null and void, this will immediately eliminate the Plaintiff as a bidder on military contracts, for an immediate price advantage to out of state distributors will be created, and as heretofore set forth herein, the Plaintiff will suffer, if said law and order are allowed to remain in effect, irreparable injury, and milk and milk products moving in Interstate Commerce will be unduly burdened because of said Orders and Statute; that the Plaintiff, because of the nature of its business, has an investment in equipment and machinery in excess of One-half Million Dollars; which the Plaintiff stands to lose if it is not given relief from the Statute and Orders complained of. That the loss on existing military contracts, if the Plaintiff is forced to pay the prices set forth in the Order heretofore described, would exceed $25,000.00 per month during the present life of existing contracts.

25. That the manner in which Chapter 501, Florida Statutes, permits the acquisition of jurisdiction thereunder by Defendants and the methods of enforcement thereof:

[fol. 9] A. Deprive the Plaintiff of property without due process of Law.

B. Deny to the Plaintiff equal protection of the Law.

C. Impose a burden upon Interstate Commerce.

D. Permits the exercise of jurisdiction over areas the exclusive jurisdiction over which is reserved to the United States.

E. Impairs the obligation of contracts.

All of the foregoing are in violation of the Constitution of the United States. The same vice as set forth above is applicable to Official Order No. NEF-15.

26. That Chapter 501, Florida Statutes, unlawfully and unconstitutionally delegates the authority vested in the Legislature of Florida to the Defendants.

27. That the Act does not define with reasonable certainty the term "market" but leaves the area to be served to the unbridled and uncontrolled discretion of a State administrative agency.

28. That the contracts of Plaintiff with the United States of America, which provide for delivery of approximately 70% of Plaintiff's volume, will be impaired, and Plaintiff will be required to pay the minimum rates for milk as set forth in the Official Order heretofore described, thus damaging it to the extent of approximately $1,000.00 per day, unless the same is declared invalid.

29. That more than 70% of the milk distributed by Plaintiff is produced without the State of Florida, a large part of which is further transported in Interstate Commerce, and the Act and Order complained of cause an undue burden on Interstate Commerce, as heretofore set forth.

30. That the Plaintiff will be irreparably injured because no damages are recoverable against the State of Florida. The Plaintiff will further be irreparably injured because it is subject to lose its license and thereby be forced out of business for non-compliance with said law and with the official order complained of.

31. In addition to all of the foregoing, the Plaintiff will be irreparably injured in that under the Act, it can be subjected to criminal penalties.

[fol. 10] ~ 32. The Plaintiff will further suffer irreparable injury because the action of the Defendants will interfere with and impair the right of the Plaintiff to bid on milk to be furnished to the military establishment at Fort Benning, Georgia, which said milk contract has been awarded to the Plaintiff for the past eight (8) years, as this litigation can not be completed by the first part of February, when the next request for bids will be made by the Government.

Wherefore, Plaintiff prays that it be awarded a Temporary Injunction, enjoining and restraining the Defendant from enforcing or attempting to enforce the Orders hereinbefore mentioned and/or enforcing the provisions of Chapter 501, Florida Statutes, and that a three-Judge Court shall hear and determine the action or proceeding in accordance with Section 2284, Title 28, United States Code, and that pending such hearing by said three-Judge Court that Judge G. Harrold Carswell grant a Temporary Restraining Order to prevent irreparable damage to the Plaintiff, and thereafter a Permanent Injunction shall issue, and thereafter that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, be declared and adjudged to be null and void, unconstitutional and of no effect, and that the Plaintiff be granted such other and further relief as shall be appropriate in the premises.

Beall & Caro, Attorneys at Law, Florida National Bank Building, Pensacola, Florida, By Philip D. Beall;

Jones and Harrell, Attorneys at Law, P. O. Box 732, Florida National Bank Building, Pensacola, Florida, By Joe J. Harrell;

Attorneys for Plaintiff.

[fol. 11]

EXHIBIT "A" TO COMPLAINT

(Emblem)

(Letterhead of Florida Milk Commission, Tallahassee, Florida)

File: 1.3.11.7

To: All Producers, Producer-Distributors and Distributors Pensacola Milk Marketing Area

This is to inform you that the vote, by the producers and producer-distributors of the Pensacola Milk Marketing Area on the question:

"Do you, as a producer of milk in the Pensacola Milk Marketing Area, request the Florida Milk Commission

to invoke the provisions of Chapter 501, Florida Statutes, in the Pensacola Milk Marketing Area!",

has been certified to this Commission by the independent Certified Public Accounting firm who conducted the election on November 21, 1961, as having carried in favor of the Commission exercising its supervisory powers within this area in accordance with Chapter 501, Florida Statutes.

Therefore, as of November 22, 1961, all regulations of this Commission applicable to the Pensacola Milk Marketing Area are effective.

Sincerely yours,

/s/ E. V. Fisher

E. V. Fisher
Administrator

EVF:L:hh

cc: Commission Members, C.P.A. and Attorney
Deputy Administrators
Mr. W. J. Barritt, Borden's Dairy, Tampa, Florida
Producer Associations
Distributor Associations

[fol. 12]

Exhibit "B" to Complaint

(Letterhead of Florida Milk Commission,
Tallahassee, Florida)

30 November 1961

File: 1.5.6.3

To: All Producers and Producer-Distributors
Pensacola Milk Marketing Area

Chapter 501, Florida Statutes, states in part;

"Every producer and producer-distributor within the state must secure from the Commission an annual permit to engate in business. No charge shall be required therefor, but no producer or producer-distribu-

tor shall engage in business within the state unless such permit be secured and continued in full force and effect. . . . "

Therefore, enclosed herewith is a form to be completed in detail for you to make application to this Commission for a Producer's Permit.

Your cooperation and immediate attention is requested in filing for your permit. On and after January 1, 1961, you will be in violation of Chapter 501, said date being set as the deadline for you to make your application.

Sincerely yours,

/s/ E. V. FISHER

E. V. FISHER
Administrator

EVF:L:hh
cc: All Distributors—Pensacola Area

[fol. 13]

EXHIBIT "C" TO COMPLAINT

(Emblem)

(Letterhead of Florida Milk Commission,
Tallahassee, Florida)

1 December 1961

Files: 1.5.1.3
1.5.2.3
1.5.3.3

To: All Distributors, Producer-Distributors and
Bobtail Distributors—Pensacola Milk Marketing Area

Chapter 501.09(4), Florida Statutes, states in part: "No person shall engage in the business of distributing milk within any marketing area established by the Commission, nor shall any person act as a distributor of milk within any such area, unless such person shall have obtained from the Commission a license to act as a distributor of milk within such area."

By a secret ballot vote of the producers in the Pensacola Milk Marketing Area, November 21, 1961, the Florida Milk Commission was requested to exercise its supervisory powers within the area.

Therefore, enclosed are proper forms for you to apply to this Commission for a license to engage in the business of distributing milk within the Pensacola area in compliance with Chapter 501, Florida Statutes.

Your cooperation and prompt attention to the above is requested.

Sincerely yours,

/s/ E. V. FISHER

E. V. FISHER
Administrator

EVF:L:hh
Enclosures

[fol. 14]

EXHIBIT "D" TO COMPLAINT

(Letterhead of Florida Milk Commission,
Tallahassee, Florida)

20 December 1961

File: 1.3.11.7

Polar Ice Cream and Creamery
Pensacola, Florida

Gentlemen:

The Florida Milk Commission, at its meeting on December 13, 1961, held in Jacksonville, Florida, adopted the Military Milk Order presently existing in the Northeast Florida Area, a copy of which is enclosed. The Commission agreed to recognize all existing military contracts now held by distributors in the Pensacola Area, provided a copy of these contracts was filed with this office within the next thirty (30) day period.

We shall appreciate having a copy of each existing contract in order to comply with the Commission's action.

If there is any question, please do not hesitate to contact us.

Very truly yours,

/s/ E. V. Fisher

E. V. Fisher
Administrator

EVF:dn

[fol. 15]

STATE OF FLORIDA
MILK COMMISSION

Tallahassee, Florida

OFFICIAL ORDER
NO. NEF-15

In the Matter of Sales of Milk to Military Installations in the Northeast Florida Milk Marketing Area.

The Commission finds:

1. It has held public hearing pursuant to due notice, at which all persons desiring to be heard were given an opportunity to be heard, respecting the subject matter of this order, and it is legally authorized to enter this order.

2. Under the present order of this Commission distributors and producer-distributors pay their producers the minimum prices established for all milk utilized in Class I channels, including such Class I milk sold by them under contract with military installations of the United States. A great deal of such milk is sold to such installations on bid, and in bulk quantities, and at cheaper prices than it is sold to the public generally.

3. Because distributors and producer-distributors have a smaller margin of profit on such sales, representatives of them have urged the Commission by order to allow them to pay their producers less for such milk so utilized than for other milk utilized in Class I channels. They have in many

instances imported milk from outside the state to supply milk on these contracts, because they can purchase such milk either as surplus milk or other milk that for various reasons can be purchased and shipped into the state at less cost to them than the price therefor they would pay their producers in Florida.

4. Representatives of producers have objected to any lower prices for this kind of milk. They advise some lowering of price, under which their surplus milk will be so utilized, will give them some immediate advantage but believe that, as all such contracts are short term, and let on a bid basis, the result over a period of time will be to encourage local production and eventually result in greater surpluses.

5. Reduced prices for producers for their milk utilized in such sales will be of benefit to them and the milk industry in Florida and to the public, if such lowered prices result in the use of their milk that would not be utilized otherwise in Class I channels, and at return to them equal or greater than they otherwise would receive for it, without increasing the surplus, but otherwise, would not be advisable. Should any portion or part of the order be held invalid, inoperative or unenforceable by any competent court, the entire order should become immediately void, as the order, if it is to accomplish the results intended, must be valid, operative and enforceable in its entirety.

6. This order constitutes a reasonable regulation of the milk industry of the State of Florida in the several markets of the state supervised and regulated by the Commission, is necessary to carry out the purposes of Chapter 501, Florida Statutes, and is the regulation of a matter reasonably incidental to the general or specific powers given to the Commission by Chapter 501, Florida Statutes:

[fol. 16] Now Therefore:

It Is Hereby Ordered:

1. Any distributor in any market desiring to utilize milk for sale to military installations of the United States at prices fixed herein may do so, provided:

A. A majority in number of the base earned producers producing not less than fifty-one per cent (51%) in volume of milk produced by all of such producers in the market in a secret ballot election vote to have their surplus milk utilized in sales to military installations according to the price schedule contained in this order. Such election shall be conducted by and under the supervision of the Commission and in accordance with such procedure as it may provide for each particular election.

B. An initial election shall be conducted within thirty (30) days after effective date of this order, and annually thereafter except that a special election shall be conducted within thirty (30) days after receipt by this Commission of a petition requesting such special election, signed by not less than fifteen per cent (15%) in number of the total number of base earned producers in the Northeast Florida Milk Marketing Area, or signed by one or more distributors licensed by this Commission to operate within the Northeast Florida Milk Marketing Area. The results of any special election shall not alter or amend the price to be paid producers for milk sold to military installations, resulting from a bid or bids by distributors pursuant to the results of any initial election or annual election provided for herein. Provided however, that all bids submitted by distributors for the purpose of obtaining military contracts in excess of twelve (12) calendar months duration are first submitted to and approved by the Commission.

2. In event, in any election held pursuant to the preceding paragraphs hereof, a majority in number of the producers in the market producing not less than fifty-one per cent (51%) of the milk produced by all producers in the market do not vote to have their surplus milk in the market utilized in sales to military installations, according to the price schedules contained in this order, any distributor in the market may receive milk from sources other than its base earned producers, process it in its plant or plants in the market, and utilize it for sale to military installations without the volume of milk so received, processed and being sold considered as milk distributed by it for the purposes of settlement with and payment to its base earned producers.

3. If this order becomes effective it is mandatory that each distributor release his surplus milk for transfer or diversion to another distributor when such will result in a higher net return to that distributor's producers.

4. For purposes hereof, surplus milk means all milk of any distributor not needed to fulfill that distributor's Class I requirements, and, in any event means any milk of any distributor in excess of one hundred ten per cent (110%) of that distributor's Class I requirements at any time.

5. When, pursuant to the election provided herein, milk may be sold by distributors to military installations at the prices fixed herein, any distributor holding a contract for such sale and paying in accordance with this order must first utilize all of the surplus milk available to him within the market before that distributor may procure milk from without the market for such use. Should the distributor be unable to obtain sufficient surplus to fulfill a military contract, to the extent that he is unable so to do, the distributor may obtain milk by importation or otherwise and utilize it in fulfilling such contract without the volume of milk so obtained being considered for payment and settlement purposes to and with the distributor's local producers.

[fol. 17] 6. Payment to producers for milk sold to military installations under and pursuant to the provisions of paragraph (1) hereof shall be made as follows:

A minimum of 40 cents per gallon shall be paid for milk testing 3.5% or less in butterfat when the contract bid price for all estimated quantities called for under the contract averages 55 cents per gallon or less. For each one cent or fraction thereof that the contract bid price exceeds 55 cents per gallon, as computed above, the producer shall receive one-half of that amount in addition to the minimum price of 40 cents per gallon. Producers shall be paid in addition to the price determined by the bid, six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests more than 3.5% in butterfat.

7. Payment by distributors for all milk received as transferred or diverted milk pursuant to this order shall be made at least monthly and not later than the time of final settlement with their own base-earned producers.

8. As used herein, distributor means both distributors and producer-distributors, as defined in Chapter 501, Florida Statutes.

9. This order is applicable only to the Northeast Florida Milk Marketing Area.

10. Any prior order of the Commission in conflict herewith to the extent of such conflict is hereby repealed.

11. Should any word, phrase, sentence, paragraph, or portion of this order be held invalid, inoperative or unenforceable by any competent court, this entire order shall thereupon immediately become null and void.

12. This order shall become effective fifteen (15) days after a copy of it is filed with the Secretary of State of the State of Florida.

DONE AND ORDERED by the Florida Milk Commission at Tallahassee, Florida, this 27th day of January, 1960.

FLORIDA MILK COMMISSION

/s/ J. BRAILEY ODHAM

J. BRAILEY ODHAM, Chairman

ATTEST:

/s/ WILMER W. BASSETT, JR.

WILMER W. BASSETT, JR., Secretary

Filed with the Secretary of State
this 25th day of February 1960.

Posted in the office of the FLORIDA MILK COMMISSION, Tallahassee, Florida this
25th day of February 1960.

[fol. 18]

EXHIBIT "E" TO COMPLAINT

Standard Form 33 (Revised June 1955)
Prescribed by General Services
Administration
Regulation I-II 209.00

Contract DA 09-038-AIII-2032 Page 1 of 17

Order No.

INVITATION, BID & AWARD
(Supply Contract)

Issued By	Address
Purchasing & Contracting Office	Fort Benning, Georgia

INVITATION FOR BIDS

Date Issued	Invitation No.
16 January 1961	09-038-61-58

Sealed bids in triplicate subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions (Standard Form 32 Oct. 57 edition), which are incorporated herein by reference and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 10:00 o'clock A.M. EST Time 7 Feb. 1961 (date) and at that time publicly opened for furnishing the supplies or services described in the accompanying Schedule, for delivery f.o.b. Destination.

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

Schedule

Item No.	Supplies or Services	Quantity No. of Units	Unit	Unit Price	Amount

INVITATION FOR: Dairy Products to be delivered to Fort Benning, Georgia.

PROCUREMENT AUTHORITY: Title 10, U.S.C., Section 2304(a).

CONTENTS: Invitation, Bid and Award, Pages 1 thru 17 General Provisions, Pages 1 thru 14.

BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001.

Bid	Date of Bid February 1961

In compliance with the above the undersigned offers and agrees if this Bid be accepted within ..... calendar days (60 calendar days unless a different period be inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

.....percent, 10 calendar days .....percent, 20 calendar days, ...percent, 80 calendar days.

BIDDER REPRESENTS: (Check appropriate boxes)

(1) That the aggregate number of employees of the bidder and its affiliates is ( ) 500 or more, (X) less than 500.

(2) That he is a ( ) regular dealer in, ( ) manufacturer of, the supplies bid upon.

(3) (a) That he ( ) has (X) has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ( ) has (X) has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee" see Code of Federal Regulations Title 44 Part 150.)

(4) He operates as an ( ) individual, ( ) partnership, (X) corporation, incorporated in the State of Florida.

Name and Address of Bidder (Street, city, zone and State. Type or print.)

Polar Ice Cream & Creamery Co., P. O. Box 586, 639 W. Gregory St., Pensacola, Fla.

Signature of person authorized to sign bid.

/s/ J. F. W. ZIRKELBACH, President

[fol. 18a]

Award Date of Award 14 March 1961

Accepted as to items numbered Section II, Part I, Items 1 thru 18
Amount Estimated $1,491,110.80
United States of America

By /s/ JACK H. BLALOCK

JACK H. BLALOCK
Contracting Officer.

Submit invoice for Payment
Finance & Accounting Office
Fort Benning, Georgia.

Accounting & Appropriation Data
REQUIREMENTS CONTRACT: Funds and accounting and appropriation date will be cited on each order issued hereunder.

Payment will be made by
Finance & Accounting Officer
Fort Benning, Georgia.

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

[fol. 19]

EXHIBIT "F" TO COMPLAINT

APPROVAL OF CONTRACT

CONTRACT NUMBER
AF 08(637)-1169

CONTRACTOR

Polar Ice Cream & Creamery Co.
PO Box 586, 639 W. Gregory
Pensacola, Florida

APPROVED: 2 Jun 1961

/s/ WILLIS A. BECKER
WILLIS A. BECKER
Acting Director of Procurement
and Production
Air Defense Command

[fol. 20]

Standard Form 33 (Oct. 1957 Edition)
Prescribed by General Services
Administration
Regulation I-II—209.00

SMALL BUSINESS RESTRICTED ADVERTISING

Vendor
Contract AF 08(637)-1169 Page 1 of 9

Order No. Class—8910

INVITATION, BID, AND AWARD
(Supply Contract)

RC
61-C-9060

Issued by
Base Procurement Office

Address
Tyndall AFB, Florida

INVITATION FOR BIDS

Date Issued
14 April 1961

Invitation No.
08-637-61-105

Sealed bids in Triplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 1:00 o'clock p.m., CST Time, 15 May 1961 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delibery f.o.b. Destination.

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

Schedule

Item No.	Supplies or Services	Quantity No. of Units	Unit	Unit Price	Amount

See Continuation Sheets Numbered 3 thru 9
Contract Authority 10 U.S.C. 2304 (a) (1)

All or None Basis

Procurement of Dairy Products for Troop
Issue—1 Jul 61 thru 31 Dec 61
Purchase request No. ABSQ-B Ltr dtd 12 Apr 61

Bid Date of Bid May 12 1961

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within ..... calendar days (60 calendar days unless a different period be inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:
.....percent, 10 calendar days; .....percent, 20 calendar days; .....percent, 30 calendar days.
BIDDER REPRESENTS: (Check appropriate boxes)
(1) that he (X) is, ( ) is not, a small business concern. (See definition on reverse hereof.) If bidder is a small business concern and is not the manufacturer of the

supplies bid upon, he also represents that all supplies to be furnished hereunder (X) will, ( ) will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a ( ) regular dealer in, ( ) manufacturer of, the supplies bid upon.

(3) (a) That he ( ) has, (X) has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ( ) has, (X) has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Part 150.)

(4) He operates as an ( ) individual, ( ) partnership, (X) corporation, incorporated in the State of Fla.

Name and Address of Bidder (Street, city, zone and State. Type or print)

Polar Ice Cream & Creamery Co.
PO Box 586, 639 W. Gregory St.
Pensacola, Fla.

Signature of person authorized to sign bid
/s/ J. F. W. ZIRKELBACH, President — 12 May 1961

Award	Date of Award
Accepted as to items numbered 1 thru 5	Amount $68,975.00

United States of America
By /s/ RUBY C. VASSAS — 27 May 1961
RUBY C. VASSAS
Contracting Officer.

Submit Invoice for Payment to
Accounting & Finance Officer
Tyndall AFB, Florida

Payment will be made by
Accounting & Finance Officer
Tyndall AFB, Florida

Accounting and Appropriation Data
Funds are not obligated by this instrument. All calls or delivery orders placed against this contract will contain a certification of availability of funds together with a citation of the proper allotment account to be charged in making payment.

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

[fol. 21]

EXHIBIT "G" TO COMPLAINT

APPROVAL OF CONTRACT

CONTRACT NUMBER
AF 08(620)-406

CONTRACTOR

Polar Ice Cream & Creamery Co.
639 W. Gregory Street
Pensacola, Florida

APPROVED:.....

.....
CHARLES W. DELANOY
Colonel USAF
Director of Procurement Mgt.
Air Defense Command

[fol. 22]
Standard Form 33 (Oct. 1957 Edition)
Prescribed by General Services
Administration
Regulation I-II 209.00

Contract No. AF 08(620)-406 Page 1 of 8
Order No.

INVITATION, BID, AND AWARD
(Supply Contract)

Issued by
Base Procurement Office
4751st Air Defense Wing (Missile) (ADC)

Address
Building 9012, Room 13
Eglin AF Auxiliary Field #9, Florida

INVITATION FOR BIDS

Mrs. Coldiron: 643106

Date Issued	Invitation No.
8 November 1961	08-620-62-11

Sealed bids in triplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions (MCP 71-1032 1 May 61 edition), which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 3:00 o'clock P.m., C.S. Time, 8 December 1961 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delivery f.o.b. Eglin AF Auxiliary Field #9, Florida.

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

P/R AFT 2551-170-62 Schedule

Item No.	Supplies or Services	Quantity No. of Units	Unit	Unit Price	Amount

(Milk and Dairy Products for Troop Issue and Commissary Resale)

Notification of this procurement was published in the Department of Commerce Synopsis of the U. S. Government Proposed Procurements, Sales, and Contract Awards.

(All or None Basis)

BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001.

CONTRACT AUTHORITY 10 U.S.C. 2304 (a) (17) and Section 15 of the Small Business Act.

Bid Date of Bid Dec 6th 1961

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within ..... calendar days (60 calendar days unless a different period be inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

..... percent, 10 calendar days; ..... percent, 20 calendar days; ..... percent, 30 calendar days.

BIDDER REPRESENTS: (Check appropriate boxes)

(1) That he (X) is, ( ) is not, a small business concern. (See definition on reverse hereof.) If bidder is a small business concern and is not the manufacturer of the supplies bid upon, he also represents that all supplies to be furnished hereunder (X) will, ( ) will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a (X) regular dealer in, (X) manufacturer of, the supplies bid upon.

(3) (a) That he ( ) has, (X) has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ( ) has, (X) has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Part 150.)

(4) He operates as an ( ) individual, ( ) partnership, (X) corporation, incorporated in the State of Fla.

Name and Address of Bidder (Street, city, zone and State. Type or print)

Polar Ice Cream & Creamery Co.
639 W. Gregory St.
Pensacola, Fla.

Signature of person authorized to sign bid.

/s/ J. F. W. ZIRKELBACH, President

Award Date of Award 13 December 1961

Accepted as to items numbered
1 through 21
Amount Estimated $71,297.00
United States of America
ROBERT B. TEAMAN, 1st Lt. USAF
Contracting Officer.

Submit invoice for payment to
Accounting and Finance
Eglin AF Auxiliary Field #9, Florida

Payment will be made by
Accounting and Finance
Eglin AF Auxiliary Field #9, Florida

Accounting and Appropriation Data
Funds are not obligated by this instrument. All calls or delivery orders placed against this contract will contain a certification of availability of funds together with a citation of the proper allotment account to be charged in making payment.

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

[fol. 23]

EXHIBIT "H" TO COMPLAINT

Standard Form 26
Prescribed by General Services
Administration, Nov. 1949 Edition

Contract No.

Contract No. N61331s-1092 Page 1 of 1

Order No.

AWARD
(Supply Contract)

Date of Award	Invitation No.
22 June 1961	61331-4-62

To (Contractor and address)
Polar Ice Cream Creamery Co.
639 W. Gregory Street
Pensacola, Florida

Issued By
Supply Officer
U. S. Navy Mine Defense Laboratory
Panama City, Florida

Invoice for Payment Should Be Mailed To
Supply Officer
U. S. Navy Mine Defense Laboratory
Panama City, Florida

Payment Will Be Made By
U. S. Navy Regional Accounts Office
U. S. Naval Base
Norfolk 11, Va.

Your bid on the above numbered Invitation for Bids is hereby accepted as to the items enumerated below with the additions or changes made by you, which additions or changes are set forth in full below.

FOR DELIVERY IN ACCORDANCE WITH THE SCHEDULE OF THE INVITATION AND BID

MILK, fresh, Pasteurized, Homogenized:

Item No.	Supplies or Services	Quantity (Number of Units)	Unit	Unit Price	Amount
1.	½ Pint Cartons.	20,000	½ Pt.	.045	$900.00
2.	5-gallon cans, bulk dispenser use.	4,000	Gal	.60	2,400.00
	Items 1 and 2 shall be in accordance with Specifications C-M-381e dated 8-12-50 and Amend. 3 dated 10-9-56, Type III, No. 1.				
3.	Buttermilk, cultured, 1 qt. cartons, to be in accordance with Specifications C-B-816b dated 5-20-52, Type I.	250	Qt	.11	27.50
4.	Chocolate flavored drink, 1 qt. cartons, to be in accordance with Specifications Mil-M-3801 dated 9-3-52 and Amend. 2 dated 6-10-54, Type III, Class 2.	1200	Qt	.10	120.00
5.	Cottage Cheese, creamed, 16 oz. cartons, to be in accordance with Specifications C-C-281c dated 3-9-60 Type II.	136	Ctn	.18	24.48
6.	Cottage Cheese, creamed, 2 lb. cartons, to be in accordance with Specifications C-C-281c dated 3-9-60, Type II.	20	Ctn	.35	7.00

PRIORITY
DO-C9 certified for national defense use under DMS Reg. 1.

Estimated Total Amount $3,478.98

This Award consummates the contract, which consists of the following documents, including any Continuation Sheets thereto: (*a*) the Government's Invitation for Bids and your Bid, (*b*) the Schedule, (*c*) the General Provisions, and (*d*) the Government's Award. No further contractual document is necessary.

UNITED STATES OF AMERICA

By .....
K. D. STRICKLER, CDR SC USN
Contracting Officer

[fol. 24]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Tallahassee Civil No. 851

[Title omitted]

TEMPORARY RESTRAINING ORDER—January 9, 1962

This Cause coming on for hearing before me on this ninth day of January 1962, pursuant to petition for temrary restraining order filed herein by the Plaintiff, Polar Ice Cream & Creamery Company, against the Florida Milk Commission as an instrumentality of the State of Florida and the members thereof specifically constituting said instrumentality and each being represented by their respective counsel; and the Court having heard argument of counsel and being otherwise fully advised in the premises; it is thereupon

Ordered and Adjudged that; Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone and Dr. James Acree, as and constituting the Florida Milk Commission, [fol. 25] and Florida Milk Commission, an instrumentality of the State of Florida, be and they are individually and

collectively temporarily restrained from enforcing, as against this Plaintiff, either directly or indirectly any of the matters and things set forth in Official Order No. NEF-15 of the Defendant, Florida Milk Commission, insofar as such order might have any applicability whatsoever as against this Plaintiff; and it is further

Ordered and Adjudged, that Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, be and they are hereby temporarily restrained severally and collectively from imposing any punishment or penalty whatsoever against this Plaintiff from any act of commission or omission arising out of the receipt of milk for and its distribution to any military installation whatsoever, and it is further

Ordered and Adjudged, that Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, be and they are further temporarily restrained severally and collectively from including any [fol. 26] of the gallons of milk distributed to a military installation in its calculation designed to result in the determination of the license fee to be collected from this Plaintiff for doing business as a distributor in the State of Florida as defined by Chapter 501, Florida Statutes.

It Is Further Ordered and Adjudged that this Court specifically reserves further jurisdiction in this cause, pursuant to Section 2284(3), Title 28, United States Code.

Done and Ordered in chambers at Tallahassee, Florida, this 9th day of January, A. C., 1962.

G. Harrold Carswell, United States District Judge.

[fol. 27]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

[Title omitted]

AMENDED COMPLAINT—Filed February 9, 1962

Comes Now the Plaintiff, Polar Ice Cream & Creamery Company, and files this, its Amended Complaint, against the Defendants above named in the style of this Cause, prior to the time before a responsive pleading is served on it, and alleges:

33. That it realleges all of the matters and things heretofore set forth in the original Complaint heretofore filed herein, and does herein adopt all of the matters and things set forth therein, together with the exhibits attached thereto, the same as if they were set forth in full herein.

34. That subsequent to the entry of the Temporary Restraining Order in this Cause, and subsequent to the filing of the original Complaint, the Plaintiff received from The Florida Milk Commission a letter dated January 24, 1962, setting forth, among other things, that the Florida Milk Commission had audited producers' receipts for the months of November and December, 1961, and that there is an additional amount of $18,556.53 due producers, based on prices paid for such milk in the month of October, 1961, and that the Florida Milk Commission Order 20-18 requires that settlement in full be made by the Distributor at least [fol. 28] once a month to each producer delivering milk to that distributor during any calendar month. Enclosed in the letter above described was a schedule of producer payments due for November and December, 1961. The letter and schedule are attached hereto, marked Exhibit "I", and made a part hereof.

35. In reply to the letter above described, the Plaintiff, through its President, wrote a letter of inquiry to E. V. Fisher, Administrator of Florida Milk Commission, a copy of said letter being attached hereto, marked Exhibit "J", and made a part hereof.

36. Thereafter, in reply, the Plaintiff received a letter from the Florida Milk Commission, through its attorney, dated January 31, 1962. A copy of said letter is attached hereto, marked Exhibit "K", and made a part hereof.

37. That, thereafter, Plaintiff received from the Florida Milk Commission, by letter dated January 25, 1962, a list which purports to be the "bases" of the Polar Ice Cream & Creamery Company for the year 1962. A copy of said letter is attached hereto, marked Exhibit "L", and made a part hereof.

38. That, thereafter, Official Order PEN-2 was received, which is marked Exhibit "M", attached hereto, and made a part hereof.

39. That, thereafter, Official Order PEN-3 was received and is attached hereto, marked Exhibit "N", and made a part hereof.

40. That, thereafter, Official Order PEN-4 was received, is attached hereto, marked Exhibit "O", and made a part hereof.

41. That, thereafter, Official Order 20-28 was received, is attached hereto, marked Exhibit "P", and made a part hereof.

[fol. 29] 42. That, thereafter, Official Order #20-29 was received by the Plaintiff, is attached hereto, marked Exhibit "Q", and made a part hereof.

43. That since the Pensacola Milk Marketing Area came under the alleged jurisdiction of the Florida Milk Commission, the Florida Milk Commission has at all times taken the position that the Plaintiff must buy all of its requirements of milk from Florida producers at a price to be fixed by the Florida Milk Commission, and in accordance with a ratio schedule set up by the Milk Commission to be applied to each Florida milk producer. Out-of-state milk could not be purchased by Plaintiff, in accordance with the interpretation of the law by Defendants, until after all Florida milk, including surplus milk which might be shipped from any place in Florida to the Plaintiff, had been exhausted.

44. To implement the acknowledged plan of the Defendants, the various Exhibits "I" through "Q" (with the exception of the Plaintiff, Exhibit "J") were issued.

45. The letter of E. V. Fisher, Exhibit "I", attempts to saddle the Plaintiff with contracts with various producers not of its making, based upon some secret ratio or mathematical formula unknown to the Plaintiff, although Plaintiff has constantly, by letter and otherwise, sought to find out how such figure was arrived at by the Commission. The result of this illegal action is that the Plaintiff is now being charged with the payment of the sum of $18,556.53, without having contracted to pay the same, and without having any knowledge as to how the sum was determined, and this clearly is a violation of the Plaintiff's rights under the Constitution of the United States.

[fol. 30] 46. That Official Order PEN-3, Exhibit "N", purports to provide for the cost of transportation and costs of handling of surplus milk, after setting forth that by order of the Commission the minimum price to be paid producers, fixed F.O.B. platform of the distributor. The practical result of this order is to provide for the payment of the transportation charges incurred in forcing the Plaintiff and other distributors to accept surplus milk. It is implicit in the Order that the Milk Commission controls the distribution of surplus milk, so that the net result, insofar as this Plaintiff is concerned, is that the Milk Commission could force it to accept surplus milk to meet all of its requirements until the supply of all surplus Florida milk has been exhausted. This obviously precludes the Plaintiff from contracting with out-of-state producers for its requirements of milk, which may be obtained at a price of some 15¢ to 20¢ per gallon cheaper than the minimum price set by the Florida Milk Commission, as hereinafter set forth herein.

That this Order is in restraint of trade and imposes an undue burden on commerce between the various States and is invalid.

47. That Official Order PEN-4, Exhibit "O", sets forth, among other things,

"1. That the Pensacola Milk Marketing Area, as regularly defined by this Commission, formally came under the jurisdiction and control of the Commission on the 21st day of November 1961; and

2. That no valid order has been in existence from such time until this hearing establishing the prices to be paid producers for the milk delivered to several distributors involved in such area.

The Commission further finds, as a matter of fact, that an emergency exists which requires the establishment of such producer prices in the Pensacola Milk Marketing Area during the interim from the date of [fol. 31] this motion to the formal consideration of the evidence presented at this price hearing, and the entry of an order resulting therefrom, and accordingly:

IT IS ORDERED:

Distributors and producer-distributors in this area shall pay producers the following minimum prices f.o.b. platform of the distributor or producer-distributor:

For all Class I milk as defined by Official Order of the Florida Milk Commission:

SIXTY-ONE CENTS ($.61) a gallon for milk testing four per cent (4%) butterfat, . . ."

Official Order PEN-4 was adopted January 18, 1962, and the same admits that since the Pensacola Milk Marketing Area allegedly came within the jurisdiction and control of the Florida Milk Commission, that no valid order had been in existence establishing prices to be paid to producers. On the face of this, it immediately becomes apparent that the Defendants, in their letter (Exhibit "I") attempt to saddle the Plaintiff with a retro-active application of some order which would be clearly illegal and in violation of the Plaintiff's constitutional rights. The Plaintiff alleges that the Official Order PEN-4 is illegal and invalid, in that it sets forth no facts which constitute an emergency, and that in truth and in fact, no emergency

exists which is recognized by the Defendants in stating that there is a surplus milk production as is set forth in Official Order PEN-2 (Exhibit "M"). The legislative intent, insofar as the passage of emergency milk orders is concerned, is set forth in 501.13(1), as follows:

> "(1) The Commission shall ascertain by such investigation and proofs as the emergency permits and requires what prices for milk in the several localities and markets of the state and under varying conditions will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most to the public interest."

[fol. 32] 48. There can be no emergency if there is a surplus of milk, which is readily admitted in the Commission's Orders. There is no allegation touching the wholesomeness of milk, which, as heretofore set forth in the original Complaint, is covered by Chapter 502, Florida Statutes, and is under the control of the Commissioner of Agriculture and not under that of the Defendants.

Official Order #PEN-4 further decreed that 61¢ a gallon for milk testing 4% butterfat is the minimum price which must be paid for Class I milk by distributors. This price is the highest published price in the United States known to the Plaintiff, and in support of this allegation by Plaintiff, there is attached hereto Plaintiff's Exhibit "R", which is made a part hereof, an excerpt from Fluid Milk & Cream Report, January 16, 1962, prepared by the United States Department of Agriculture. The price of 61¢ per gallon equals $7.09 per cwt.

As heretofore alleged in the original Complaint of Plaintiff, the Plaintiff has purchased some 70% of its milk requirements from outside the State of Florida, and has paid prices for milk of comparable butterfat averaging at least 15¢ to 20¢ per gallon less than the minimum price fixed by the Florida Milk Commission. That the fixing of a price of 61¢ per gallon is an undue burden on Interstate

Commerce, depri[illegible] the Plaintiff of a right to contract with out-of-state producers, and as set forth in the original Complaint, has as its sole purpose the economic isolation of Florida milk producers, under the subterfuge of insuring that the public will have a wholesome, constant supply of milk available. That in reality, there is such a surplus of milk that if every cow in Florida were to die tomorrow, the milk requirements of the public in Florida could be [fol. 33] satisfied within 48 hours with out-of-state milk. Good roads and modern methods of transportation have put competition on wheels and now allow the Plaintiff and other distributors within the State of Florida to purchase raw milk from Wisconsin, Chicago, Illinois, and other distant points, thus graphically setting forth the interstate aspects of the milk business and the wisdom in preventing a single state from imposing a burden on commerce between the various states; that the need of the safeguard of the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution is greater now than ever before. There is a greater surplus of milk and milk products in the United States of America today than there has ever been in the history of this country. This fact is graphically portrayed by Exhibits "S" and "T", attached hereto and made a part hereof, both of which came from wire services of this date, Exhibit "S" being from Dow Jones News Service, and Exhibit "T" being from Commodity News Service. A cursory reading of these two exhibits will show the absurdity of the Milk Commission's position in declaring an emergency in this area.

49. Official Order #20-28 requires that a tax on all Class I milk, as defined in said Order, be paid as follows:

"(a) Chapter 501, Florida Statutes, requires every distributor and producer-distributor to pay, to the Commission, a tax of 15/100 of 1¢ per gallon on all milk distributed.

(b) Chapter 501, Florida Statutes, further provides that every distributor and producer-distributor shall deduct a tax of 15/100 of 1¢ per gallon on all Class I milk delivered to them by the producer. This tax must

be remitted to the Commission at the time the distributor's monthly report is filed. This tax must also be paid on all Class I milk produced by the distributor or producer-distributor."

[fol. 34] That said tax is wholly unconstitutional in that the law, as heretofore and hereinafter set forth, under which the tax is levied, is invalid.

50. Official Order #20-29 sets forth that an emergency exists, and sets forth that effective March 4, 1962, the price of 61¢ per gallon for milk testing 4% butterfat is the price set throughout all of the milk marketing areas of the State of Florida under the jurisdiction of the Florida Milk Commission. This Order has the inherent defects of Official Order PEN-4 (Exhibit "O").

51. That the Plaintiff is threatened with loss of its license, as well as penal consequences, which could be punishable by fine or imprisonment, unless it complies with all of the foregoing Orders and Chapter 501, Florida Statutes, all of which will cause irreparable injury, financial ruin, and criminal consequences, unless Plaintiff is granted the relief prayed for, and given the protection of the injunctive processes of this Court. The excerpt of the minutes of the Milk Commission, set forth in the letter of its attorney, marked Exhibit "K", clearly sets forth the fact that unless Plaintiff complies with the Orders of the Commission, a Rule to Show Cause why its license will not be revoked will be considered in the next meeting of the Milk Commission, which is scheduled for February 14, 1962.

52. From all of the foregoing, the Plaintiff alleges that the Florida Milk Commission has attempted to regulate the price paid by the distributor to the producers and has attempted to set up the ratio of payments to each individual producer; that the Defendants have attempted to preclude the Plaintiff from contracting with out-of-state producers and has required it to pay a price greatly in excess of the market price needed to be paid for the purchase of milk, all to the detriment of the Plaintiff, and [fol. 35] in violation of its constitutional rights. Furthermore, the Plaintiff alleges that the Orders heretofore de-

scribed herein are invalid; that the Act under which the Orders were promulgated is unconstitutional and invalid; that no emergency exists in the State of Florida insofar as the supply of wholesome milk is concerned; that the setting forth in said Orders that an emergency did exist was but a subterfuge in an attempt to saddle the Plaintiff and others with the burdens described in such Orders at this time. That the tax attempted to be imposed by the provisions of such Order and Chapter 501, Florida Statutes, is invalid and unconstitutional; that the Act itself, as well as all of the Orders and matters and things attempted to be accomplished thereby, are an undue burden on Interstate Commerce and are in violation of the Commerce Clause of the Constitution of the United States. That, furthermore, such law and the Orders heretofore described herein illegally and unreasonably impair the Plaintiff's right to contract, deprive it of equal protection of the law, and as heretofore set forth in the original Complaint herein, deprives it of property without due process of law, and violates the Privilege and Immunities Clause (Article IV, Section 3, Cl. 1) of the Constitution of the United States.

Wherefore, Plaintiff adopts the prayer of its original Complaint, and in addition thereto, requests that the Three-Judge Court shall consider the matters and things as set forth in this Amended Complaint, so as to prevent a multiplicity of suits, in addition to those previously set forth in the original Complaint; that pending the hearing by the Three-Judge Court, Judge G. Harrold Carswell shall grant a Temporary Restraining Order, in addition to the Restraining Order now in force, restraining the Defendants and each and every of them, and the Defendant, [fol. 36] Florida Milk Commission, from attempting to enforce any of the Orders attached hereto as Exhibits, or the matters and things reflected therein, against this Plaintiff, so as to prevent irreparable damage to said Plaintiff, and that thereafter, a permanent Injunction shall issue, enjoining and restraining the Defendants from taking any further action against the Plaintiff, and that the Orders as heretofore set forth herein, be declared to be

null and void and of no effect, and that Chapter 501, Florida Statutes, and all orders issued pursuant thereto be declared to be null and void, unconstitutional and of no effect, and that the Plaintiff be granted such other and further relief as shall be appropriate in the premises.

Beall and Caro, Florida National Bank Building, Pensacola, Florida, By Philip D. Beall;

Jones and Harrell, Suite 505, Florida National Bank Building, Pensacola, Florida, By Joe J. Harrell, Attorneys for Plaintiff.

[fol. 37] *Duly sworn to by J. F. W. Zirkelbach, jurat omitted in printing.*

Certificate of service (omitted in printing).

[fol. 38]

EXHIBIT "I" TO AMENDED COMPLAINT

(Letterhead of Florida Milk Commission, Tallahassee, Florida)

24 January 1962

Files: 1.3.11.8
2.4.2.5
1.3.21.2.5

Mr. J. F. Zirklebach
President
Polar Ice Cream and Creamery
Pensacola, Florida

Dear Mr. Zirklebach:

This office has previously notified you of the action of the Florida Milk Commission at its regular meeting held in Tallahassee, Florida on January 17, 1962 in which they ordered Polar Ice Cream and Creamery Company to determine the amounts due the producers for milk delivered to their plant on the basis of its previous course of dealing at the time the area came under the Commission's supervision.

The Commission further ordered that our auditors be instructed to audit Polar Ice Cream and Creamery Company's records to determine these amounts due to the producers. We have audited producer receipts for the months of November and December which show that there is an additional amount of $18,556.53 due your producers based on the prices paid for such milk in the month of October, 1961.

Commission Order 20-18 requires that settlement in full be made by a distributor at least once each month to each producer delivering milk to that distributor during any [fol. 39] calendar month. In compliance with this order, the amounts due your producers for the months of November and December are delinquent and payment should be made immediately.

The attached list of producers, with amounts owed each, which have been verified by our auditors is for your convenience in expediting payment. Your compliance as ordered by the Commission will be appreciated.

Very truly yours,

E. V. Fisher
Administrator

EVF:hh

cc: Mr. Mallory E. Horne, Attorney at Law,
Tallahassee, Florida
Mr. Lawrence Roberts, Accountant,
Tallahassee, Florida
Mr. Daniel M. Wagner, Deputy Administrator,
Tallahassee, Florida

[fol. 40]

POLAR ICE CREAM AND CREAMERY
PENSACOLA, FLORIDA

PRODUCER PAYMENTS DUE FOR NOVEMBER AND DECEMBER, 1961

Producer	November	December	Total
John Adkinson	$ 373.20	$ 1,368.15	$ 1,741.35
Frank Ard	176.79	758.69	935.48
E. J. Ard	67.85	251.73	319.58
J. W. Chavers	100.97	461.72	562.69
Clyde Creighton	224.80	936.39	1,161.19
R. Abromobitz	92.68	335.93	428.61
Dorsey Eicher	58.83	224.20	283.03
Leland Eicher	89.93	334.10	424.03
Newell Eicher	89.88	334.14	424.02
Ward Eicher	90.54	449.99	540.53
Dale Harms	73.08	259.49	332.57
Marshall Harms	76.96	272.17	349.13
Johnson Brothers	97.71	266.36	364.07
Menno Koehn	68.72	310.90	379.62
Marion Koehn	84.49	296.62	381.11
John O'Farrell	269.03	994.13	1,263.16
Francis Peters	38.38	144.51	182.89
Verle Peters	38.38	144.52	182.90
Wilbert Peters	-56.76	181.94	*125.18
E. B. Mininger	42.66	229.73	272.39
A. B. Sigafoose	537.51	1,878.62	2,416.13
Jake Smith	86.55	330.43	416.98
Ray Schneider	135.07	483.00	618.07
Roy Unruh	33.41	222.54	255.95
Van Pelt Brothers	675.16	2,803.41	3,478.57
W. C. Wiggins	156.42	560.88	717.30
TOTALS	$3,722.24	$14,834.29	$18,556.53

* Includes $56.76 overpayment in November.

[fol. 41]

EXHIBIT "J" TO AMENDED COMPLAINT

Mr. E. V. Fisher, Administrator
Florida Milk Commission
Tallahassee, Florida

Dear Mr. Fisher:

I have received your letter of January 24, 1962, wherein you state that pursuant to Commission Order #20-18, Polar Ice Cream & Creamery Company, Inc. is required to pay some $18,556.53 to various producers.

We have not received a copy of this Commission Order and would like to know by what authority you feel that this sum is due the various producers. Polar Ice Cream & Creamery Company, Inc. has always tried to abide by its contracts with the various producers and pay any required payments to producers in accordance with its contractual arrangements. I am frank to state that I do not understand how you feel this sum is owed by our company, and would like a further clarification from you with respect to this matter at your earliest convenience.

Your very truly,

POLAR ICE CREAM & CREAMERY CO., INC.

By .....
President

[fol. 42]

EXHIBIT "K" TO AMENDED COMPLAINT

(Letterhead of Florida Milk Commission,
Tallahassee, Florida)

31 January 1962

Mr. J. F. W. Zirkelbach
Polar Ice Cream and Creamery Co., Inc.
Post Office Box 586
Pensacola, Florida

Dear Mr. Zirkelbach:

The following is an excerpt of the minutes of the last meeting of the Florida Milk Commission pertaining to the order of the Commission with respect to the payment by you of arrearities:

> "Mr. Logan moved that the auditors be instructed to audit the Polar Ice Cream plant and to determine the amounts due the producers on the basis of his previous course of action at the time he came under the Commission, the area came under the Commission, and that the man be made to pay the producers the amounts they are shown to be entitled to; and that if he doesn't, that the Commission can consider at its next meeting the issuance of a rule to show cause."

In addition to the motion which was regularly adopted, you may be advised that the Commission feels that you have pursued a course of conduct calculated to intimidate and coerce the producers of your area. The Commission is on record that this will not be tolerated and that we will go to whatever lengths deemed advisable to correct this situation, both as to past conduct and future intentions. You so obviously consider your producers to be pawns [fol. 43] subject to your every whim and desire that I feel constrained to advise that the relationship of producer and distributor is one which is well defined in our laws and orders.

With respect to the authority of the Commission to concern itself in this area, I direct your attention to Chapter 501.05, .06, and .07, Florida Statutes. With respect to our authority to do something for noncompliance with these orders, I direct your attention to Chapter 501.08 and 501.09, Florida Statutes, which grants the right of injunction and revocation for any commission or omission contrary to the statutes or orders pertaining thereto.

To the particular point of your letter, I wish to advise the Commission feels that you had established, by a previous course of business, a contractual relationship with your producers pertaining to the price to be paid your producers. We are further of the opinion that such contractual relationship existed at the time this Commission assumed jurisdiction and control of that marketing area and that while no valid price order of the Commission was in effect at that time, we have the responsibility to enforce, on behalf of your producers, the contractual relationship then in existence and to enforce its continuance unless cause is shown for change in such relationship. We offer, therefore, the enforcement arm of this Commission to your producers. If this does not fully answer your inquiry and if it does not fully advise you of the position and intent of this Commission, please have your attorney call me, for I shall be delighted to advise him of our specific intent with respect to the execution of the matters related herein by me.

Sincerely,

/s/ MALLORY E. HORNE
Mallory E. Horne
Attorney at Law

MEH:dn
cc: Producers for Polar Ice Cream
Commission Members

[fol. 44]

EXHIBIT "L" TO AMENDED COMPLAINT

FLORIDA MILK COMMISSION
Dorian Building
Tallahassee, Florida

25 January 1962.

File: 2.4.1
2.4.1.5

The following is a list of your bases in the Polar Ice Cream and Creamery Co., Pensacola, for the year 1962.

We have used your "pounds of Milk" base, that you had established with your plant, and converted it into a "base percentage". This means that your base per cent remains the same for the year, and entitles you to that percentage of the Class I milk sales each month.

1962 BASE PER CENT

John Adkinson	8.784	Menno Koehn	1.995
Frank Ard	4.856	Marion Koehn	2.151
E. J. Ard	1.627	John O'Farrell	6.644
J. W. Chavers	2.927	Francis Peters	.973
Clyde Creighton	6.042	Verle Peters	.973
R. Abromovitz	2.289	Wilbert Peters	1.438
Dorsey Eicher	1.452	E. B. Mininger	1.687
Leland Eicher	2.341	A. B. Sigafoose	13.270
Newell Eicher	2.341	Jake Smith	2.136
Ward Eicher	2.948	Ray Schneider	3.335
Dale Harms	1.805	Roy Unruh	1.894
Marshal Harms	1.900	Van Pelt Bros.	17.917
Johnson Brothers	2.413	W. C. Wiggins	3.862
			100.000%

If we can be of any assistance, or if you need a further explanation on the above, please let us know.

Yours very truly,

/s/ F. B. LEVERETTE
F. B. Leverette
Deputy Administrator

cc: Polar Ice Cream & Creamery
Mr. Dan Wagner
Tallahassee Office

[fol. 45]

EXHIBIT "M" TO AMENDED COMPLAINT

STATE OF FLORIDA
MILK COMMISSION
Tallahassee

OFFICIAL ORDER
PEN-2

IN THE MATTER OF CONTINUING EARNED BASES AND REALLOCATING PORTIONS OF THE EARNED BASES, UNDER CERTAIN CONDITIONS, IN THE PENSACOLA MILK MARKETING AREA.

After investigation and study, the Florida Milk Commission has determined and found, and hereby determines and finds:

That a condition of surplus milk production exists in the Pensacola Milk Marketing Area, and that such surplus condition has existed for the past several years and has been gradually increasing; and

That such surplus condition is brought about at least partially by the fact that producers during base fixing periods have tended to produce more milk than is required, and milk in excess of the needs of the plants for Class I sales, in order to increase their earned base percentages in their respective plants; and

The tendency of producers in this area to produce each year during base fixing period additional quantities of milk in order to increase their earned bases results in the aggravation of the surplus milk problem by increasing the surplus, with consequent lowered blend prices to the producers, so that such continued practice may eventually result in the requirement of higher prices to be paid producers for their milk, and be to the economic disadvantage of the public, and the milk industry; and

Such practice is a demoralizing and uneconomic trade practice in the production of milk which impairs the dairy industry in this area; and

There exists in this area a need for the establishment of a plan or method whereby such tendency on the part of producers to produce such surplus milk may be discouraged without at the same time reducing the volume of milk below the volume needed to be produced in order to satisfy the requirements of the plants for Class I milk in this area; and

The order hereby adopted will accomplish these objectives and provide a method that will establish proper relationship of producers with distributors in this area, so as to maintain an orderly and proper production of milk in this milk marketing area and eliminate the demoralizing and uneconomic trade practice now existing in it, and is reasonable and necessary to carry out the purpose of Chapter 501, Florida Statutes; Now Therefore

[fol. 46] It Is Ordered That each distributor who is found upon examination following the completion of a base fixing period to have received from his earned base producers milk in excess of one hundred ten per cent (110%) of Class I sales during said base fixing period, shall:

1. Continue the last earned base of each producer who produces during the ensuing base fixing period a quantity of milk at least equal to his production during the last base fixing period reduced by the quantity of milk equal to his earned base percentage of the quantity of milk received by the distribntor from his

earned base producers in excess of one hundred per cent (100%) of his Class I sales during the last base fixing period; and

2. In event any producer fails to produce the minimum quantity of milk required in "1" above, reallocate among all earned base producers in proportion to their last earned bases a percentage of that producer's earned base determined by dividing one hundred per cent (100%) of the distributors Class I sales during the last base fixing period into the amount such producer failed to produce in order to comply with the requirements of "1" above; and

3. Reallocate to a producer or producers designated by the Commission as much as five per cent (5%) of the total earned base of all producers to such extent and in such manner as may be ordered by the Commission:

   a. for a growth allowance to a producer an increase in whose volume of production is determined by the Commission to be justified for economic reasons, or

   b. for an initial base to a new producer, or

   c. for the alleviation of a hardship on the part of a producer that may be determined by the Commission to exist, or

   d. for other purposes or reasons that may be determined by the Commission to be justified.

PROVIDED, HOWEVER, the Commission may, for good cause by it determined to exist, otherwise provide in specific cases, and shall supervise and control the execution hereof and may determine the duration of the effectiveness of any act pursuant thereto.

IT IS FURTHER ORDERED THAT, when a distributor is found upon examination following completion of a base fixing period to have received from earned base producers during that base fixing period a volume of milk equal to or less than one hundred ten per cent (110%) of Class I sales dur-

ing that base fixing period, the Commission may, either upon its own initiative when it deems and finds such is in the public interest after a public hearing thereon pursuant to due notice thereof, or upon application of the distributor and a majority of his base earned producers, continue for the duration of the ensuing base year the last earned base of each producer, and, in event it does so continue such bases, the Commission may also reallocate to such producer or producers as may be designated by it as much as five per cent (5%) of the total earned base of all producers to such extent and in such manner as may be ordered by the Commission:

[fol. 47] a. for a growth allowance to a producer an increase in whose volume of production is determined by the Commisison to be justified for economic reasons, or

b. for an initial base to a new producer, or

c. for the alleviation of a hardship on the part of a producer that may be determined by the Commission to exist, or

d. for other purposes or reasons that may be determined by the Commission to be justified.

When application of the distributor and a majority of his base earned producers is made the Commission is not required to hold public hearing thereon, but shall do so when it acts upon its own initiative.

It Is Further Ordered That, as used herein, distributor includes both distributor and producer-distributor, as defined by Chapter 501, Florida Statutes.

It Is Further Ordered That:

This order is applicable only to the Pensacola Milk Marketing Area.

Done and Ordered by the Florida Milk Commission at Jacksonville, Florida, this 13th day of December, 1961.

Florida Milk Commission

C. O. Andrews, Jr.
Chairman

ATTEST:

ALEX G. SHAW, Secretary

Filed with the Secretary of State this ..... day of ..... 19.....

Posted in the office of the Florida Milk Commission this ..... day of ....., 19.....

[fol. 48]

EXHIBIT "N" TO AMENDED COMPLAINT

STATE OF FLORIDA
MILK COMMISSION
Tallahassee

OFFICIAL ORDER
PEN-3

IN THE MATTER OF AND RELATING TO MAXIMUM CHARGES FOR HANDLING AND MAXIMUM RATES FOR HAULING MILK IN THE STATE OF FLORIDA, PENSACOLA MILK MARKETING AREA.

After investigation and study, the Florida Milk Commission has determined and found, and hereby determines and finds:

By order of this Commission, the minimum prices to be paid producers is fixed F.O.B. platform of the distributor so that the cost of transportation of the producer's milk to the distributor is borne by the producer. The cost of transporting milk transferred or diverted from one plant to another plant is also borne by the producer, and should be borne by the producer when such transfer or diversion results in utilization of the milk so transferred or diverted in a higher classification than otherwise would have resulted, as such transfer or diversion thus results in a higher price being paid for that milk to the producer.

The transfer or diversion of milk is within the control of the distributor and subject to the control of the Commission; he should be required to assume the responsibility of seeing that the milk will be utilized in a higher classification and should not be allowed to charge the producer for transportation of milk transferred or diverted from plant to plant when such transfer or diversion does not result in the utilization of milk in such higher classification.

The distributor incurs some expense in handling milk that is transferred or diverted from plant to plant, and, when the transfer or diversion results in a higher utilization, should be permitted to make a charge therefor. As the milk should not be transferred or diverted with any expense to the producers unless higher utilization does result therefrom, and transfer or diversion is within the control of the distributor, as aforesaid stated, no handling charge for transferring milk or diverting milk should be permitted unless higher utilization results therefrom.

The distributor incurs less expense in the handling of milk diverted than in the handling of milk transferred from plant to plant, but should be encouraged to divert rather than transfer milk, as it is more economic, and tends to result in less impairment of the quality of milk, less loss, spoilage and wastage, and less delay in the time elapsed from its production to its ultimate consumption or utilization. By reason thereof, and as an incentive to the distributor, he should be allowed to charge more in proportion to his cost of handling for milk diverted than for milk transferred when higher utilization results.

[fol. 49] Costs of transportation of milk vary because of differences in quantities and distances hauled, kinds of roads travelled and other like factors. Order of this Commission fixing such charges should set maximum charges that should be permitted, based on a reasonable average charge. Such order should contain provision whereby the Commission may permit charges in excess thereof for transportation of milk from the place of production to the milk gathering station or processing plant where good reason exists in a particular case, because of such variance in costs. As milk transferred or diverted is transported in larger

bulk quantities, provision for exception to the maximum charges permitted for such transportation is not needed nor justified.

The evidence before the Commission establishes that the charges and matters allowed and contained in this order, as hereafter set out, are reasonable, and that this order constitutes and is a reasonable regulation of, and relating to, the production, transportation, manufacture, storage, distribution, delivery and sale of milk in this milk marketing area, and is necessary for proper and reasonable public supervision and control in accordance with proper standards of production and marketing of milk, and for complying with the requirements of Chapter 501, Florida Statutes, and the expressed intent of the legislature, that the producers receive a fair return for their products.

NOW THEREFORE, IT IS ORDERED

That the maximum charges to producers for transporting milk from the place where produced to the milk gathering station or processing plant where delivered to the distributor shall be as follows:

"MAXIMUM CHARGE ALLOWED PER GALLON"

From	Through	From Farm to Station or Plant	Amount
0	10	miles, shortest road mileage	$ .0175
10	20	miles, shortest road mileage	.02
20	30	miles, shortest road mileage	.0225
30	50	miles, shortest road mileage	.0275
50	75	miles, shortest road mileage	.0325
75	100	miles, shortest road mileage	.0375
100	125	miles, shortest road mileage	.0425
125	150	miles, shortest road mileage, or more	.0475

IT IS FURTHER ORDERED that the maximum charges to producers for the transportation of milk transferred or diverted from plant to plant shall be as follows:

(a) Trucks of less than 2,250 gallons—25¢ per mile plus ½¢ per gallon.

(b) Trucks with capacities of 2,250 to 4,000 gallons—30¢ per mile plus ½¢ per gallon.

(c) Trucks with capacities of 4,000 gallons and more—35¢ per mile plus ½¢ per gallon,

with there being permitted, however, a minimum charge of $25.00 per load, and

[fol. 50] It Is Also Ordered that a distributor from whose plant milk in bulk is diverted may charge not in excess of $.02 per gallon as a handling charge for such milk; and that a distributor from whose plant milk in bulk is transferred may charge not in excess of $.03 per gallon as a handling charge for such milk transferred.

It Being Expressly Provided and Ordered, However, that no charge either for transporting or handling any milk so transferred or diverted may be made by, or will be allowed to, a distributor unless the transfer or diversion results in the milk being utilized in a higher classification than would have been the case had it not been so transferred or diverted, or unless the Commission has authorized such transfer or diversion.

It Is Further Ordered That:

(1) Distributors and all others may make no charges, directly or indirectly to producers, for the transportation and handling of milk in excess of or other than those authorized and permitted by this order, or made with the prior approval of the Commission first obtained, as provided herein.

(2) Charges in excess of those authorized herein for transportation from the place where produced to the milk gathering station or processing plant may be made, Provided, the prior approval of the Commission is first obtained. One transporting milk desiring to make charges in excess of those authorized herein shall make written application to the Commission, setting forth the charges such applicant desires authorized, the route or routes, plant or plants, and producer or producers involved, and the reasons why applicant believes such application should be granted. If the Commission determines there is another

who is qualified to, and can and will, transport the milk at rates or charges lower than those desired by the applicant, the application will be denied.

(3) The amounts of charges for transportation of milk, to the extent that such are herein authorized and allowed, may be deducted by the distributor from the amounts due the producer, if the transportation is performed by the distributor. If the transportation is performed by someone other than the distributor, the amounts of charges for transportation of milk, to the extent that such are herein authorized and allowed, may be so deducted from the amounts due such producer and paid to the one so transporting, provided the producer authorizes that such be done. When a distributor is entitled to charge for the handling of milk transferred or diverted, as provided herein, the amounts of such charges to the extent that such are herein authorized and allowed, may be deducted from the amounts due such producer by the distributor.

(4) In every instance the means of delivery from the place of production to the station or plant shall be a matter for mutual agreement between the particular distributor involved, provided, however, the Commission may, upon application made to it, and determination by it that reasonable grounds exist therefor, permit or require the transportation of a particular producer's milk to be performed either by his distributor or by someone else.

[fol. 51] It Is Further Ordered that, as used herein, distributor includes both distributor and producer-distributor, as defined by Chapter 501, Florida Statutes.

It Is Further Ordered That:

This order, and its requirements, are applicable only to the Pensacola Milk Marketing Area. Insofar as transporting and handling of milk from the place where produced to the milk gathering station or processing plant is concerned, it applies in every instance where the milk gathering station or processing plant is within this area and the place of production is within the State of Florida.

DONE AND ORDERED by the FLORIDA MILK COMMISSION at Jacksonville, Florida this 13th day of December, 1961.

FLORIDA MILK COMMISSION

CHARLES O. ANDREWS
Chairman

ATTEST:

ALEX G. SHAW
Secretary

Filed in the office of the Secretary of State this ..... day of .....
1962.

Posted in the office of the Florida Milk Commission this ..... day of .....
1962.

[fol. 52]

EXHIBIT "O" TO AMENDED COMPLAINT

Authenticated as a true copy of the original thereof.

.....
Administrator

STATE OF FLORIDA
MILK COMMISSION
Tallahassee

OFFICIAL ORDER
PEN-4

IN THE MATTER OF ESTABLISHING AND FIXING MINIMUM PRICES TO BE PAID PRODUCERS FOR MILK IN THE PENSACOLA MILK MARKETING AREA.

WHEREAS, the Florida Milk Commission held public hearing in Tallahassee, Florida on the 17th day of January 1962; and

WHEREAS, the Florida Milk Commission finds and by entry of this order takes judicial notice of the following:

1. That the Pensacola Milk Marketing Area, as regularly defined by this Commission, formally came under the jurisdiction and control of the Commission on the 21st day of November 1961; and

2. That no valid order has been in existence from such time until this hearing establishing the prices to be paid producers for the milk delivered to several distributors involved in such area.

The Commission further finds, as a matter of fact, that an emergency exists which requires the establishment of such producer prices in the Pensacola Milk Marketing Area during the interim from the date of this motion to the formal consideration of the evidence presented at this price hearing, and the entry of an order resulting therefrom, and accordingly;

IT IS ORDERED:

Distributors and producer-distributors in this area shall pay producers the following minimum prices f.o.b. platform of the distributor or producer-distributor:

For all Class I milk as defined by Official Order of the Florida Milk Commission:

> SIXTY-ONE CENTS ($.61) a gallon for milk testing four per cent (4%) butterfat, and for milk testing more or less than four per cent (4%) butterfat, sixty-one cents ($.61) a gallon plus six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests more than four per cent (4%) butterfat, and less six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests less than four per cent (4%) butterfat.

For all Class II milk as defined by Official Order of the Florida Milk Commission:

For each gallon of Class II milk testing four per cent (4%) butterfat, the minimum price shall be one cent ($.01) per gallon less than the price established each month for Class II milk pursuant to the Miami, Florida, Federal Milk Marketing Order, No. 118.

[fol. 53] For all Class II milk testing more or less than four per cent (4%) butterfat, the minimum price a gallon shall be the minimum price for such milk testing four per cent (4%) butterfat, determined as aforesaid, plus six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests more than four per cent (4%) butterfat and less six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests less than four per cent (4%) butterfat.

For all Class III milk as defined by Official Order of the Florida Milk Commission:

Twenty-six Cents ($.26) a gallon for milk testing four per cent (4%) butterfat, and for milk testing more or less than four per cent (4%) butterfat, twenty-six cents ($.26) a gallon plus ($.0065) a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests more than four per cent (4%) butterfat, and less ($.0065) a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests less than four per cent (4%) butterfat. All of such Class III milk transferred to another utilization shall be paid for at the price established for such utilization less three cents ($.03) per gallon of milk so transferred.

The Commission finds that an emergency exists which will gravely affect the health, safety or welfare of the citizens of this entire state and the Administrator of this Commission is hereby authorized to make the affidavit to that effect, provided for by Section 120.14, Florida Statutes, for and on behalf of this Commission, and to file copy immediately with the Secretary of State, in accordance with Section 120.14, Florida Statutes, so that this order may be effective immediately as provided by law.

Any prior order of this Commission in conflict herewith to the extent of such conflict is hereby repealed.

DONE AND ORDERED by the FLORIDA MILK COMMISSION, at Tallahassee, Florida, this 18th day of January 1962.

FLORIDA MILK COMMISSION
C. O. ANDREWS, JR., Chairman

ATTEST:

ALEX G. SHAW, Secretary

Filed in the office of the Secretary of State this 1st day of February 1962.

Posted in the office of the Florida Milk Commission this 1st day of February, 1962.

[fol. 54]

EXHIBIT "P" TO AMENDED COMPLAINT

STATE OF FLORIDA
MILK COMMISSION
Tallahassee

OFFICIAL ORDER
NO. 20-28

IN THE MATTER OF AMENDING OFFICIAL ORDER No. 20-5, DEFINING CLASSES OF MILK IN THE STATE OF FLORIDA.

WHEREAS, the Commission, after public hearing, investigation and thorough discussion, has now determined that the classifications of milk should be revised, NOW THEREFORE

IT IS HEREBY ORDERED THAT:

1. CLASS I MILK is hereby defined as all fluid milk or milk products sold in fluid form with the exception of buttermilk, chocolate drink and cream.

(a) For the purpose of calculating settlement by distributors and/or producer-distributors to producers for skim milk and fortified skim, the total sales in gallons of these products shall be multiplied by ninety-five per cent (95%) and added to all other sales of Class I milk.

2. CLASS II MILK shall be all skim milk and butterfat:

(a) Used to produce acidophilus milk, buttermilk, chocolate drink, half and half, light cream, heavy cream and sour cream, and

(b) Contained in inventories in the form of milk products designated as Class I milk pursuant to paragraph (1) of this section on hand at the end of each month and accounting period; *provided*, that Class II classification of shrinkage prorated to skim and butterfat, respectively, in producer milk shall not exceed two per cent (2%) of skim and butterfat in producer milk.

3. CLASS III MILK shall be all skim milk and butterfat:

(a) Used to produce any product other than those specified in paragraphs (1) and (2) of this section;

(b) That portion of fortified milk or skim milk not classified as Class I milk pursuant to subparagraph (1) (a) of this section, and

(c) In total shrinkage or skim milk and butterfat, respectively, such shrinkage to be prorated to producer milk and other source milk received in the form of fluid milk or skim milk.

[fol. 55] CLASS IV MILK shall be all milk the skim portion of which is:

(a) Disposed of for fertilizer or livestock feed, and

(b) Dumped after such prior notification as the Commission administrator may require.

IT IS FURTHER ORDERED that a tax shall be paid on all Class I milk distributed as defined hereinabove:

(a) Chapter 501, Florida Statutes, requires every distributor and producer-distributor to pay, to the Commission, a tax of 15/100 of 1¢ per gallon on all milk distributed.

(b) Chapter 501, Florida Statutes, further provides that every distributor and producer-distributor shall deduct a tax of 15/100 of 1¢ per gallon on all Class I milk delivered to them by the producer. This tax must be remitted to the Commission at the time the distributor's monthly report is filed. This tax must also be paid on all Class I milk produced by the distributor or producer-distributor.

IT IS FURTHER ORDERED that a tax shall be paid by distributors and producer-distributors on all cream distributed:

For the purpose of determining the tax due the Commission the milk equivalent shall be determined for all cream distributed and the following formulas shall be followed:

1 gallon of heavy cream equals ten (10) gallons of milk.

1 gallon of light and/or sour cream equals five (5) gallons of milk.

1 gallon of half and half equals two and one-half (2½) gallons of milk.

The above tax of 15/100 of 1¢ per gallon shall be paid on the whole milk equivalent using the above formula for all of the heavy cream, light and sour cream, and half and half distributed at wholesale or retail less that portion of the cream which has been separated pursuant to the method in calculating the settlement by distributors and/or producer-distributors to producers for skim milk and fortified skim.

[fol. 56] ALL ORDERS, or parts of orders, in conflict herewith are hereby repealed.

THIS ORDER to become effective March 1, 1962.

DONE AND ORDERED by the Florida Milk Commission, in Tallahassee, Florida, this 17th day of January, 1962.

FLORIDA MILK COMMISSION
C. O. ANDREWS, JR., Chairman

ATTEST:

ALEX G. SHAW, Secretary

Filed with the Secretary of State this ..... day of ..... 1962.

Posted in the office of the FLORIDA MILK COMMISSION, this ..... day of ..... 1962.

[fol. 57]

EXHIBIT "Q" TO AMENDED COMPLAINT

Authenticated as a true copy of the original thereof.

.....
Administrator

STATE OF FLORIDA
MILK COMMISSION
Tallahassee

OFFICIAL ORDER
No. 20-29

IN THE MATTER OF ESTABLISHING AND FIXING MINIMUM PRICES TO BE PAID PRODUCERS FOR MILK IN ALL OF THE MILK MARKETING AREAS OF THE FLORIDA MILK COMMISSION.

WHEREAS, the Florida Milk Commission held a public hearing after proper notice, in Tallahassee, Florida, on

November 17, 1961 and January 17, 1962, for all of the milk marketing areas as defined by order of the Florida Milk Commission; and

WHEREAS, the Commission has now ascertained by such investigations and proofs as the emergency permits and requires the price the producers in this area should now be paid for milk in this marketing area that will best protect the milk industry and insure a sufficient quantity of pure and wholesome milk to adults and minors, with special regard to the health and welfare of children and that will be most to the public interest; and

WHEREAS, The Commission has determined that the following prices to be paid producers in this area are reasonable and necessary;

NOW THEREFORE;

IT IS ORDERED:

Distributors and producer-distributors in all milk marketing areas shall pay producers the following minimum prices f.o.b. platform of the distributor or producer-distributor:

For all Class I milk as defined by Official Order of the Florida Milk Commission:

SIXTY-ONE CENTS ($.61) a gallon for milk testing four per cent (4%) butterfat, and for milk testing more or less than four per cent (4%) butterfat, sixty-one cents ($.61) a gallon plus six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests more than four per cent (4%) butterfat, and less six and one-half (6½) mills a gallon for each one-tenth (1/10) of one per cent (1%) by which such milk tests less than four per cent (4%) butterfat.

For all Class II milk as defined by Official Order of the Florida Milk Commission:

For each gallon of Class II milk testing four per cent (4%) butterfat, the minimum price shall be the price

established each month for Class II milk pursuant to the Miami, Florida Federal Milk Marketing Order.

[fol. 58] In the Pensacola, Tallahassee and Northeast Florida Milk Marketing Areas, as defined by the orders of the Florida Milk Commission, this price shall be one cent ($.01) per gallon less than the price established each month for such milk.

For all Class III milk as defined by Official Order of the Florida Milk Commission:

For each gallon of Class III milk testing four per cent (4%) butterfat, the minimum price shall be the price established each month for Class III milk pursuant to the Miami, Florida Federal Milk Marketing Order.

In the Pensacola, Tallahassee and Northeast Florida Milk Marketing Areas, as defined by orders of the Florida Milk Commission, this price shall be one cent ($.01) per gallon less than the price established each month for such milk.

For all Class IV milk as defined by Official Order of the Florida Milk Commission:

For each gallon of Class IV milk testing four per cent (4%) butterfat, the minimum price shall be the price established each month for Class IV milk pursuant to the Miami, Florida Federal Milk Marketing Order.

In the Pensacola, Tallahassee and Northeast Florida Milk Marketing Areas, as defined by the orders of the Florida Milk Commission, this price shall be one cent ($.01) per gallon less than the price established each month for such milk.

Nothing in this order shall preclude payment to producers in excess of the price herein established for Class I milk when such excess payment represents premium breed milk and such excess payment is uniformly paid to the entire class of producers supplying such milk.

Any prior order of this Commission in conflict herewith to the extent of such conflict is hereby repealed.

This order shall become effective at 12:01 A.M., March 4, 1962.

DONE AND ORDERED by the FLORIDA MILK COMMISSION, at Tallahassee, Florida this 18th day of January 1962.

FLORIDA MILK COMMISSION

C. O. ANDREWS, JR., Chairman

ATTEST:

ALEX G. SHAW, Secretary

Filed in the office of the Secretary of State this 1st day of February 1962.

Posted in the office of the Florida Milk Commission this 1st day of February 1962.

[fol. 59]

Exhibit "R" to Amended Complaint

(See opposite)

Table 7.--Dealers' buying prices for milk for fluid use, minimum [illegible] Order blend prices and average prices paid to producers in selected fluid markets, United States, November 1961

(F.O.B. market or basic zone location)

Marketing area	Basic fat test	Butterfat differential for milk above basic test	Minimum blend prices in Federal Order markets at basic test, per cwt.	Average prices paid to milk producers at basic test per cwt.	Fat diff.	At 3.5% test per cwt.
	Pct.	Cents	Dollars	Dollars	Cents	Dollars
New England:						
Boston, 201-210 mile zone	3.7	5	4.93	4.93	7.7	4.78
Springfield, Mass. (Nearby area)	3.7	6	5.90	5.90	7.7	5.75
Worcester, Mass. (")	3.7	6	6.08	6.08	7.7	5.93
Southeastern New England (")	3.7	6	6.12	6.12	7.7	5.97
Connecticut (")	3.7	6	6.00	6.00	8.0	5.85
Middle Atlantic:						
New York-New Jersey 201-210 mi.	3.5	5	4.60	4.60	5.8	4.60
Niagara Frontier, N. Y. -S	3.5	6	-	4.60	7.0	4.80
Rochester, N. Y. -S	3.5	6	-	5.03	7.0	5.03
Philadelphia, Pa. -S-PA	3.2	6	25.72	-	-	-
Pittsburgh, Pa. -S-PA	3.5	6	-	4.54	7.0	4.54
East North Central:						
Cincinnati, Ohio	3.5	4	[illegible]4.83	4.88	7.8	4.88
Columbus, Ohio	3.5	4	[illegible]4.77	4.77	7.6	4.77
Dayton-Spfld., Ohio Grade A	3.5	4	[illegible]4.67	[illegible].67	7.3	4.67
North Central Ohio	3.5	5	[illegible]4.19	[illegible]	7.[illegible]	-
Northeastern Ohio	3.5	5	4.25	[illegible].20	7.6	4.10
Toledo, Ohio	3.5	4	[illegible]4.40	-	7.5	-
Youngstown-Warren, Ohio	3.5	4	4.62	[illegible].62	7.8	4.62
Fort Wayne, Ind.	3.5	4	[illegible]4.45	[illegible].45	7.5	4.45
Indianapolis, Ind.	3.5	4	[illegible]4.75	4.75	7.2	4.75
Ohio Valley, Ind.-Ky.	4.0	5	4.78	[illegible].78	7.5	4.38
South Bend-LaPorte-Elk., Ind.	3.5	4	4.22	4.22	7.3	4.22
Chicago, Grade A; 55-70 m.z.	3.5	4	3.78	3.85	7.3	3.85
Rockford-Freeport, Ill. Grade A	3.5	4	4.52	3.97	7.3	3.97
Suburban St. Louis, Ill.	3.5	4	[illegible]4.55	4.55	7.2	4.55
Michigan Upper Peninsula	3.5	4	[illegible]4.22	4.20-4.69	7.5	4.20-4.69
Muskegon, Michigan	3.5	4	4.00	[illegible].29	7.0	4.29
Southern Michigan	3.5	4	4.09	[illegible].42	7.6	4.42
(Detroit)	3.5	4	3.92	4.40	7.0	4.40
(Flint & Valley)	3.5	4	3.92	[illegible].52	7.0	4.52
(Lansing & Jackson)	3.5	4	3.92	[illegible].46	7.0	4.46
(Battle Cr., Albion, & Kal.)	3.5	5	[illegible]3.87	4.42-4.45	7.0	4.42-4.45
(Grand Rapids)	3.5	4	3.82	4.32	7.0	4.32
Upstate Michigan	3.5	4	4.20	4.40	7.0	4.40
Milwaukee, Wisconsin	3.5	4	[illegible]3.88	4.08	7.3	4.08
Northeastern Wisconsin	3.5	4	3.84	3.84	7.4	3.84
West North Central:						
Duluth-Superior, Minn.-Wis.	3.5	4	3.73	3.73	7.6	3.73
Minneapolis-St. Paul, Minn.	3.5	4	3.85	[illegible].85	7.4	3.85
Cedar Rapids-Iowa City, Ia.	3.5	4	3.97	3.97	7.1	3.97
Des Moines, Iowa	3.5	4	4.36	[illegible].36	7.2	4.36
Quad-Cities-Dubuque, Ill.-Ia.	3.5	4	4.09	[illegible].16	7.6	4.16
North Central Iowa, Mason City	3.5	4	[illegible]4.00	[illegible].20	7.2	4.20
Sioux City, Iowa	3.5	4	[illegible]4.52	[illegible].37	7.7	4.37
Kansas City, Missouri-Kansas	3.5	4	4.00	[illegible].00	6.[illegible]	4.00
St. Joseph, Missouri	3.5	4	4.11	[illegible].11	7.0	4.11

Middle Atlantic:						
New York-New Jersey 201-210 ma..	3.5	5.7[illegible]	4.60	4.60	5.8	4.60
Niagara Frontier, N. Y. -S.....	3.5	6.00	-	4.60	7.0	4.00
Rochester, N. Y. -S.....	3.5	6.00	-	5.03	7.0	5.03
Philadelphia, Pa.-S-PA.....	3.7	e6.12	e5.71	-	-	-
Pittsburgh, Pa.-S-PA.....	3.5	6.35	-	4.54	7.0	4.54
East North Central:						
Cincinnati, Ohio.....	3.5	4.88	v4.88	4.88	7.8	4.88
Columbus, Ohio.....	3.5	4.80	v4.77	4.77	7.6	4.77
Dayton-Springfd., Ohio Grade A....	3.5	4.80	v4.67	4.67	7.3	4.67
North Central Ohio.....	3.5	e4.66	r4.49	-	7.7	-
Northeastern Ohio.....	3.5	e5.00	4.25	r4.40	7.6	4.40
Toledo, Ohio.....	3.5	e4.66	f4.40	-	7.5	-
Youngstown-Warren, Ohio.....	3.5	4.66	4.62	4.62	7.8	4.62
Fort Wayne, Ind.....	3.5	4.80	v4.45	4.45	7.5	4.45
Indianapolis, Ind.....	3.5	4.[illegible]	v4.75	4.75	7.2	4.75
Ohio Valley, Ind.-Ky.....	4.0	5.[illegible]	4.76	4.76	7.5	4.38
South Bend-LaPorte-Elk., Ind....	3.5	4.51	4.22	4.22	7.3	4.22
Chicago, Grade A, 55-70 m.s.....	3.5	e4.35	3.78	3.85	7.3	3.85
Rockford-Freeport, Ill. Grade A.	3.5	4.35	4.02	3.97	7.3	3.97
Suburban St. Louis, Ill.....	3.5	4.58	v4.55	4.55	7.2	4.55
Michigan Upper Peninsula.....	3.5	e4.34-4.84	f4.22	4.20-4.69	7.5	4.20-4.69
Muskegon, Michigan.....	3.5	e4.98	4.06	e4.29	7.0	4.29
Southern Michigan.....	3.5	-	3.99	v4.42	7.0	4.42
(Detroit).....	3.5	e5.12	3.99	4.40	7.0	4.40
(Flint & Valley).....	3.5	e5.16	3.99	4.52	7.0	4.52
(Lansing & Jackson).....	3.5	e5.09	3.92	4.46	7.0	4.46
(Battle Cr., Albion, & Kal.)..	3.5	e5.00-5.04	3.84-3.87	4.42-4.45	7.0	4.42-4.45
(Grand Rapids).....	3.5	e5.01	3.84	4.39	7.0	4.39
Upstate Michigan.....	3.5	e4.96	4.30	4.40	7.0	4.40
Milwaukee, Wisconsin.....	3.5	e5.31	f3.89	4.08	7.3	4.08
Northeastern Wisconsin.....	3.5	4.13	3.84	3.84	7.4	3.84
West North Central:						
Duluth-Superior, Minn.-Wis.....	3.5	4.14	3.73	3.73	7.6	3.73
Minneapolis St. Paul, Minn.....	3.5	4.05	3.85	3.85	7.4	3.85
Cedar Rapids-Iowa City, Ia.....	3.5	4.32	3.97	3.97	7.1	3.97
Des Moines, Iowa.....	3.5	4.65	4.36	4.36	7.2	4.36
Quad Cities-Dubuque, Ill.-Ia....	3.5	e4.47	4.09	4.16	7.4	4.16
North Central Iowa, Base Zone...	3.5	4.31	f4.20	4.20	7.2	4.20
Sioux City, Iowa.....	3.5	4.68	v4.57	4.57	7.8	4.57
Kansas City, Missouri-Kansas....	3.5	4.20	4.02	4.02	6.4	4.02
St. Joseph, Missouri.....	3.5	4.30	4.11	4.11	7.2	4.11
St. Louis, Mo., 0-30 mile zone..	3.5	4.66	v4.61	4.61	7.0	4.61
Ozarks, Missouri-Arkansas.....	3.5	4.39	v4.22	4.22	7.0	4.22
Black Hills, South Dakota.....	3.5	5.34	5.02	5.02	7.0	5.02
Eastern South Dakota.....	3.5	4.57	4.30	4.30	7.0	4.30
Sioux Falls-Mitchell, S. D.....	3.5	4.48	4.21	4.21	7.0	4.21
Nebraska-Western Iowa.....	3.5	4.69	v4.76	4.76	7.5	4.76
Neosho Valley, Kansas-Mo.....	4.0	4.98	4.50	4.50	7.3	4.14
Southwest Kansas.....	3.8	4.79	4.42	4.42	7.3	4.20
Wichita, Kansas.....	3.8	4.79	4.38	4.38	7.2	4.16
South Atlantic:						
Wilmington, Delaware.....	3.7	6.04	e5.49	5.49	7.0	5.35
Upper Chesapeake Bay, Md.....	3.5	e5.61	5.07	5.10	8.0	5.10
Washington, D. C.....	3.5	e5.70	4.94	e5.11	8.0	5.11
Charleston, W. Va.-PA.....	4.0	e6.58 D.R.	-	-	-	-
Clarksburg, West Virginia.....	3.5	5.21	5.03	5.03	7.8	5.03

[fol. 60]

(See opposite) ☞

Table 7.—Dealers' buying prices for milk for fluid use, minimum Federal Order blend prices and average prices paid to producers in selected fluid markets, United States, November 1961

(F.O.B. market or other indicated location)

Marketing area a	Basic fat test	Dealers' buying prices for milk for fluid use at basic fat test per cwt. b	Minimum blend prices in Federal Order markets at basic test per cwt.	Average prices paid to milk producers d		
				At basic test per cwt.	Fat diff.	At 3.5% test per cwt.
South Atlantic: (Continued)	*Pct.*	*Dollars*	*Dollars*	*Dollars*	*Cents*	*Dollars*
Tri-State, Ky.-O.-W. Va. (Huntington)	3.5	5.17	f4.87	4.87	7.3	4.87
Wheeling, West Virginia	3.5	4.96	4.63	4.63	7.7	4.63
North Carolina-S	4.0	6.55	—	k5.84	6.0	5.54
South Carolina-S	4.0	6.50	—	k6.32	7.0	5.97
Southeastern Florida c	4.0	6.77	6.31	6.31	7.5	5.94
East South Central:						
Louisville-Lexington, Ky	3.8	4.60	v4.81	4.81	6.5	4.62
Paducah, Kentucky	3.5	4.69	4.70	4.70	6.5	4.70
Appalachian, Tenn., Va. & Ky	4.0	5.75	5.63	5.63	7.0	5.28
Chattanooga, Tenn	4.0	g5.65	4.74	—	7.6	—
Knoxville, Tenn	4.0	g5.60	4.69	5.18	7.3	4.82
Memphis, Tenn	4.0	5.49	f5.38	5.38	6.5	5.06
Nashville, Tenn	4.0	g5.50	4.70	5.06	7.2	4.70
Central Mississippi	4.0	t5.85	5.18	t5.23	7.0	4.88
Mississippi Delta	4.0	t5.70	5.17	t5.23	7.1	4.88
Mississippi Gulf Coast	4.0	t6.00	5.18	t5.23	7.1	4.88
West South Central:						
Central Arkansas	4.0	g5.59	5.33	—	7.2	—
Fort-Smith, Arkansas	4.0	g5.64	f5.25	—	7.3	—
New Orleans, La. 0-50 mile zone	4.0	6.04	5.30	5.30	7.1	4.94
Northern Louisiana	4.0	5.92	f5.64	—	7.0	—
Oklahoma Metropolitan Area p	4.0	g5.45	4.74	4.83	7.3	4.46
Red River Valley, Okla.-Texas q	4.0	5.46	5.02	5.02	7.4	4.65
Austin-Waco, Texas, Zone I	4.0	6.02	f5.82	5.82	6.7	5.48
Central West Texas, Abilene zone	4.0	5.88	5.64	5.64	7.3	5.28
Corpus Christi, Texas 0-50 m.z	4.0	6.42	f6.32	6.32	7.3	5.96
North Texas	4.0	5.64	5.04	5.04	7.0	4.69
San Antonio, Texas	4.0	6.06	5.85	5.85	6.7	5.52
Texas Panhandle	4.0	5.79	5.08	5.08	7.1	4.73
Mountain:						
Colorado Springs-Pueblo, Colo	3.5	5.30	5.30	5.30	7.8	5.30
Eastern Colorado	3.5	5.30	4.90	4.90	7.8	4.90
Western Colorado	3.5	5.25	f4.97	4.97	8.1	4.97
Central Arizona (Tucson)	3.8	6.00	5.57	5.57	7.9	5.33
Great Basin, Utah	3.5	5.25	4.59	4.59	7.8	4.59
Pacific:						
Inland Empire, Wash.-Idaho	4.0	5.63	5.16	5.16	7.6	4.78
Puget Sound, Wash. Dist. I	4.0	g5.63	4.49	4.62	7.4	4.25

S—From State sources. D.R.—Payment in direct ratio to milkfat. PA—Producers' association prices. a. Federal Order markets unless otherwise noted. b. Prices paid to all or the major group of producers in the market for milk used for fluid consumption. For Federal markets, Class I prices including negotiated premiums. For minimum Class I price, see Table 1(a) for respective month. d. Prices paid to all or the major group of producers in the market for all pooled milk. Federal market prices include general premiums negotiated by principal producers' associations. Bulk tank (see Table 4) or other special premiums not included unless indicated. e. PNCC Area I price for milk produced in Pennsylvania. f. Individual handler pool. Weighted average of handlers' prices. g. Negotiated prices paid members of principal producers' associations. h. Gallon jug milk $6.125 D.R. at basic test. k. Average of blend prices paid by all plants in the State. m. Includes special premium.

p. Negotiated at basic test: Nov. Class I $5.45, blend $4.83 at Oklahoma City; Class I $5.50, blend $4.73 at Tulsa. q. Class I $5.55, blend $4.99 at Ardmere and Lawton. r. Stark Co. assn. blend $4.40. s. $4.22—Muskegon prod; $4.27—Holland prod; temporary adjustment because of assn. pool arrangements. t. Mississippi Milk Commission minimum price. u. Includes 9¢ from earnings. v. The following changes have been made for fall production fund: Added:- Columbus 43¢; Dayton-Springfield 39¢; Cincinnati 37¢; Ft. Wayne 28¢; Indianapolis 39¢; Suburban St. Louis 16¢; Sioux City 38¢; Nebraska-Western Iowa 35¢; St. Louis 16¢; Ozarks 15¢; Louisville-Lexington 47¢. w. Weighted average of area pools.

[fol. 61]

EXHIBIT "S" TO AMENDED COMPLAINT

TORONTO —DJ— ABITIBI POWER & PAPER CO LTD DECLARED A QUAR DIV OF 50C ON COMMON PAY APRIL 2 RECORD MARCH 1
PAID 42 1-2 CENTS IN PREVIOUS QUARTERS
—V—

ADD — HARSCO SECONDARY

N Y —DJ— BLYTH & CO IS MAKING THE SECONDARY OFFERING OF 40 000 SHARES OF HARSCO CORP COMMON AT 37 WITH CONCESSION OF 1 DLR A SHARE TO N A S D MEMBERS
[Handwritten notation—Feb 8, 1962]
—V—

DAIRY SURPLUSES INCREASE

WASHN —DJ— DAIRY SURPLUSES CONTINUED TO GROW AT A HEAVY RATE IN JANUARY THE AGRICULTURE DEPT REPORTED
THE GOVERNMENT BOUGHT NEARLY 110 000 000 POUNDS OF CHEESE BUTTER AND DRY SKIM MILK ALMOST DOUBLE THE QUANTITY PURCHASED IN JANUARY OF LAST YEAR — BY LAW THE GOVERNMENT MUST BUY DAIRY SURPLUSES TO SUPPORT FARMERS MILK PRICES AT THE AVERAGE RATE OF 3 DLS 40C A HUNDRED POUNDS
BECAUSE OF INCREASING PRODUCTION AND DECLINING CONSUMPTION U S PRICE-PROPPERS HAVE HAD TO BUY 1 300 000 000 POUNDS OF DAIRY PRODUCTS SINCE LAST APRIL — PURCHASES WERE ABOUT 810 000 000 POUNDS IN YEAR-EARLIER PERIOD
TOTAL BUTTER PURCHASES FOR THE 10-MONTH APRIL-JANUARY PERIOD TOTALED 306 000 000 POUNDS NEARLY TRIPLE THE YEAR-EARLIER FIGURE — CHEESE PURCHASES TOTALED 144 000 000 POUNDS FAR ABOVE THE 200 000 POUNDS BOUGHT IN THE 1960-61 PERIOD AND

POWDERED MILK PURCHASES CLIMBED TO 825 000 000 POUNDS FROM 704 000 000 A YEAR EARLIER
—V—

[fol. 62]

EXHIBIT "T" TO AMENDED COMPLAINT

ADD—4 MARKETS STORAGE MOVEMENTS

FZN EGGS— 59,000, LBS. IN, 279,000 LBS. OUT, 220,000 LBS. NET OUT, 33,000 LBS MORE OUT THAN YEAR AGO
END
[Handwritten notation—Feb 8 1962]

STANDARD & POOR-S NOON STOCK INDEXES

425 INDUS 74.67 UP 0.17 OR 0.23 PC
25 RAILS 34.39 OFF 0.09 OR 0.26 PC
50 UTILS 63.50 UP 0.12 OR 0.19 PC
500 STOCKS 70.57 UP 0.15 OR 0.21 PC

END

GOVERNMENT DAIRY PURCHASES

WASHINGTON.—CNS—GOVERNMENT DAIRY PRICE-SUPPORT PURCHASES IN JANUARY TOTALED 43,784,852 POUNDS OF BUTTER, 19,558,483 POUNDS OF CHEESE AND 46,558,427 POUNDS OF NONFAT DRY MILK. JANUARY PURCHASES INCLUDE 9,744,000 POUNDS OF PROCESSED CHEDDAR CHEESE, THE AGRICULTURE DEPARTMENT REPORTED.

LAST JANUARY, 19,141,764 POUNDS OF BUTTER, 35,934,469 POUNDS OF NONFAT DRY MILK AND NO CHEESE WAS PURCHASED.

THE CCC LAST MONTH COMMITTED FOR USE 5,572,285 POUNDS OF BUTTER, 21,223,464 POUNDS OF CHEESE, AND 9,837,318 POUNDS OF NON FAT DRY MILK. ABOUT 20,684,500 POUNDS OF CHEESE WAS COMMITTED FOR DOMESTIC DISTRIBUTION.

WHILE 4,429,880 POUNDS OF NON FAT DRY MILK WERE SLATED FOR DONATION ABROAD.

IN JANUARY LAST YEAR, 35,082,790 POUNDS OF BUTTER, 22,855,161 POUNDS OF NON FAT DRY MILK AND NO CHEESE WAS COMMITTED FOR USE, USDA SAID.

END

N.Y. STOCK TRANSACTIONS

	TODAY	WEDNESDAY
11-12	740,000	740,000
10-12	1,610,000	1,520,000

END

12.10 P.M. N.Y. COCOA

MAR 1895 MAY 1952 JLY 2005 SEP 2055 DEC 2105 MAR 2150 MAY 2200.

SALES 697

END

ST. LOUIS HOG MARKET

ST. LOUIS—CNS—SALABLE HOG RECEIPTS 8,500. MARKET WAS VERY UNEVEN. HOGS FROM 180 TO 240 LBS WERE STEADY TO 15 CENTS LOWER. OVER 240 LBS WERE STEADY TO STRONG, IN INSTANCES 25 HIGHER. UNDER 180 LBS WERE STEADY TO 25 LOWER. SOWS WERE STEADY TO 25 HIGHER.

SALES—190 TO 230 LBS $17.00 TO $17.35. AROUND 90 HEAD 200 TO 205 LBS $17.50. 180 TO 250 LBS $16.50 TO $17.00. 240 TO 270 LBS $16.00 TO $16.75. 270 TO 300 LBS MOSTLY $15.50 TO $16.25. 150 TO 170 LBS $15.00 TO $16.50. 120 TO 150 LBS $12.00 TO $15.00.

END

PAGE 21
11.17 AM.

[fol. 63]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

[Title omitted]

TEMPORARY RESTRAINING ORDER—February 21, 1962

This Cause coming on for hearing before me on this twenty-first day of February 1962, pursuant to amendment to original petition for temporary restraining order heretofore filed herein by the Plaintiff, Polar Ice Cream & Creamery Company, against the Florida Milk Commission as an instrumentality of the State of Florida and the members thereof specifically constituting said instrumentality and each being represented by their respective counsel; this cause further coming on for determination pursuant to motion, ore tenus, submitted at this hearing by defendants and directed to the order heretofore entered in this cause pursuant to the original petition for said order and entered by this Court on the ninth day of January 1962; and [fol. 64] the Court having heard argument of counsel and being otherwise fully advised in the premise; it is thereupon

Ordered and Adjudged that:

1. The restraining order heretofore entered by this Court on the ninth day of January 1962, involving the utilization of milk sold by Plaintiff, distributor, on military installations and the matters and things set forth in Official Order NEF-15 of the Florida Milk Commission, be and the same is hereby dissolved and discharged for the reason that the acts sought to be restrained are no longer involved and the issue has become moot.

2. Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, be and they are

individually and collectively temporarily restrained from enforcing the provisions of Chapter 501.13(8), which reads as follows; to wit:

Florida Statutes 501.13(8):

"It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this Chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful.";

[fol. 65] and that the said defendants be and they are individually and collectively further temporarily restrained from directly or indirectly requiring the Plaintiff, Polar Ice Cream and Creamery Company to accept, purchase or otherwise involve itself with any milk produced in any of the Milk Marketing Areas in the State of Florida which was not produced by the base earned producers of the Plaintiff distributor; and the Defendants are individually and collectively further temporarily restrained from enforcing or defining any base relationship between the Plaintiff distributor and its producers other than that relationship in existence between this distributor and its several producers on November 22, 1961 and the said Defendants shall not require, directly or indirectly, the payment by the Plaintiff distributor to any or all of its base earned producers for any more gallonage of milk than that being regularly purchased by it from them or either of them on November 22, 1961 or to require or alter the payment plan in effect at that time which was sixty-one cents (61¢) per gallon for milk sold in Class I utilization; and it is further

Ordered and Adjudged, that the Plaintiff, as a condition precedent to the entry of this temporary restraining order, be and it is hereby required to pay its several producers for an amount of milk up to, but not exceeding, the gallonage being purchased from said producers, individually and collectively, on November 22, 1961 and shall pay for such milk the price then being paid by him, viz: sixty-one cents (61¢) per gallon utilized in Class I sales.

[fol. 66] It Is Further Ordered and Adjudged that this Court specifically reserves further jurisdiction in this cause, pursuant to Section 2284(3), Title 28, United States Code.

Done and Ordered in chambers at Tallahassee, Florida, this 21st day of February, A.D., 1962.

G. Harrold Carswell, United States District Judge.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

[Title omitted]

PRE-TRIAL ORDER—February 21, 1962

This cause coming on to be heard on application of plaintiff for additional temporary restraining order, and order on said motion having been entered this same day by consent of the parties with reference to said temporary restraining order, and at said hearing it appearing that trial of said cause before the three judge district court heretofore duly constituted should be held as soon as practicable, it is, therefore, hereby

Ordered:

1. The trial of this cause shall be held before the three judge district court at 9:30 A.M., Eastern Standard Time, Monday, March 12, 1962, Courtroom, Federal Building, Tallahassee, Florida.

[fol. 68] 2. Counsel for plaintiff shall file with the Clerk of this Court at Tallahassee on or before Friday, March 2, 1962, statement of the issues involved, together with a list of all witnesses intended to be called to testify and a brief statement as to the general nature of the testimony proposed to be offered by each witness. Three copies shall be filed with the Clerk for dissemination to the individual judges constituting the three judge court, and counsel for plaintiff shall mail one copy thereof to counsel for defendant.

3. Counsel for defendant shall likewise make such filing with the Clerk, together with such copies as designated in paragraph 2 above, list of witnesses intended to be called to testify at the trial together with a brief summary of the testimony proposed to be elicited from each, on or before Noon, Wednesday, March 7, 1962.

4. Request for issuance of subpoenas should be submitted to United States Marshal or Clerk on or before Noon, Thursday, March 8, 1962.

Done and Ordered in Chambers at Tallahassee this 21st day of February 1961.

G. Harrold Carswell, United States District Judge.

[fol. 69]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

[Title omitted]

PLAINTIFF'S PLEADINGS FILED IN COMPLIANCE WITH PRE-TRIAL ORDER—Filed March 2, 1962

In compliance with the Court's Pre-trial Order dated February 21, 1962, the Plaintiff, Polar Ice Cream & Creamery Company, shall hereinafter set forth the names of witnesses as the same are known to it at this time, together with a brief resume of the testimony expected to be elicited from each witness, and also a brief statement

as to the issues which Plaintiff believes to be involved in this case. Defendants have not as yet filed an Answer, and because of that fact, there may well be facts and matters admitted which will eliminate some issues in this case. Likewise, the Answer of the Defendants may raise new matters which will, of necessity, require Plaintiff to produce additional witnesses in order to meet with proof these matters, and such witnesses and testimony expected to be elicited cannot be now known to the Plaintiff. In order to assist the Court, we shall set forth the names of witnesses, together with expected testimony in proof of the numbered paragraphs as the same appear in the Complaint and the Amended Complaint. It may be of benefit to the Court if the Complaint and Amended Complaint are read, paragraph by paragraph, along with like-numbered paragraphs contained in this pleading.

[fol. 70] 1. J. F. W. Zirkelbach, President of Polar Ice Cream and Creamery Company, will testify that this company is a Florida corporation with its principal office and plant being located in Pensacola, Florida, and that Plaintiff is a licensed milk distributor as defined in Chapter 501, Florida Statutes. The Court can take judicial notice of Chapter 501, Florida Statutes.

2. J. F. W. Zirkelbach, in the course of his testimony, will develop the fact that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution and Laws of the United States.

3. The allegations of Paragraph 3 are expected to be admitted by the Defendants.

4. The allegations of Paragraph 4 are expected to be admitted by the Defendants.

5. The allegations of Paragraph 5 are expected to be admitted by the Defendants.

6. The allegations of Paragraph 6 are expected to be admitted by the Defendants.

J. F. W. Zirkelbach stands ready to testify that the Plaintiff received the letters described in Paragraphs 3, 4, 5, and 6.

7. J. F. W. Zirkelbach will testify with respect to the allegations of Paragraph 7 of the Complaint and the executed copy of the contract described therein may be submitted in evidence.

8. J. F. W. Zirkelbach will testify as to matters set forth in Paragraph 8 of the Complaint, and the original executed copy of the contract may be submitted in evidence. That subsequent to the expiration of the contract marked [fol. 71] Exhibit "F", attached to the Complaint, the Plaintiff entered into a new contract with Tundall Field, Air Force Base, and proof of this contract will be made by testimony of J. F. W. Zirkelbach and the introduction of the contract itself into evidence.

9. J. F. W. Zirkelbach will testify with respect to this contract and the original or a photostatic copy of the same will be introduced into evidence.

10. J. F. W. Zirkelbach will testify as to the contract described in this Paragraph of the Complaint, and the original or a photostatic copy of the same will be introduced into evidence.

11. The arithmetical computation of the aggregate of the contracts described will be proved by an adding machine tape, together with the testimony of J. F. W. Zirkelbach and the contracts.

12. The Plaintiff expects to secure evidence of the cession of exclusive jurisdiction over the various military establishments prior to the date of hearing. The matter of this proof has been somewhat complicated, and to date, Plaintiff's counsel has made calls to Phenix City, Alabama, Columbus, Georgia, Fort Benning, Georgia, and Savannah, Georgia, with respect to this matter, and it is believed that prior to trial sufficient data with respect to the allegations of this paragraph will be obtained, so that a Stipulation may be obtained, or else some feasible agreement with respect to the proof can be effected prior to the hearing.

13. J. F. W. Zirkelbach will testify that his interpretation and the interpretation of milk distributors and previous administrative actions and interpretations of the Milk Com-

mission sustain the allegations of this Paragraph, together with the Court's legal interpretation of the language of the Order.

[fol. 72] 14. The actual provisions of the Order will, of coure, speak for themselves, and J. F. W. Zirkelbach stands ready to testify and prove the prices paid by the Plaintiff as alleged.

15. The records of the Plaintiff, together with the testimony of J. F. W. Zirkelbach, will prove the allegations of Paragraph 15 of the Complaint.

16. It is believed that counsel representing both parties will be able to enter a Stipulation with respect to the allegations of this Paragraph prior to the hearing.

17. Florida Statutes 501.13(8), as well as the case of *Baldwin* v. *Seelig*, cited in Paragraph 17 of the Complaint, will be used in proving the allegations of this paragraph.

18. The allegations of Paragraph 18 are self-proving by the terms of Florida Statutes 501.09.

19. J. F. W. Zirkelbach will give testimony with respect to the allegations of Paragraph 19 of the Complaint.

20. Chapter 501.23, Florida Statutes, will be submitted in proof of the allegations of this paragraph.

21. The provisions of Chapter 501.09, Florida Statutes, will prove the allegations of this Paragraph.

22. Chapter 502, Florida Statutes, and specifically, Sections 502.03 and 502.12, will prove that the State of Florida, under its police power, has exercised control over the wholesomeness of milk and has provided sanitary regulations as alleged. The last sentence, insofar as the allegations that Chapter 501 creates a position of economic isolation for the milk producers of the State of Florida will be proved by the testimony of J. F. W. Zirkelbach, as well as the cumulative testimony of other witnesses appearing for the Plain-
[fol. 73] tiff whose testimony will apply to this particular phase of the case. It is expected that Mr. T. C. Jacoby, whose address is Corner of Main and Olive Streets, St.

Louis, Missouri, a wholesale distributor of fluid milk on a national scale and milk producer, will testify as to facts which will substantiate the contention of the Plaintiff insofar as the entire operation of the milk business in the United States is concerned, together with proof of the existing surplus of milk throughout the United States.

23. The cumulative effect of all of the testimony expected to be produced, together with the construction by the Court of the applicable constitutional provisions, will lead, in the opinion of the Plaintiff, to a conclusion which will substantiate the allegations of Paragraph 23 of the Complaint.

24. J. F. W. Zirkelbach, together with contracts heretofore described herein, and copy of proposed bid of Fort Benning, Georgia, military installation, together with a construction of the law applicable as the same now stands, and the books and income tax returns of the Plaintiff, if necessary, will be used, together with mathematical computation necessary to arrive at the loss figure as alleged.

25. The allegations of Paragraph 25 are susceptible of proof through the testimony as above set forth expected to be elicited, and the construction by the Court after hearing the testimony and applying the applicable law.

26. The statement as set forth in Paragraph 25 is also applicable to Paragraph 26 of the Complaint.

27. The language of the Act complained of, in the opinion of the Plaintiff, will lead to the judicial interpretation as alleged.

28. The contracts, together with the Orders, as all heretofore described, will, in the opinion of the Plaintiff, lead to the conclusion as alleged in Paragraph 28.

[fol. 74] 29. The testimony of J. F. W. Zirkelbach, together with statistical data from company records, will prove the allegations of this Paragraph of the Complaint.

30. The allegations of Paragraph 30 are within the judicial knowledge of the Court, in view of the law and evidence previously described herein.

31. The penalties as heretofore described are within the judicial knowledge of the Court and are contained within the provisions of statute as heretofore alleged.

32. J. F. W. Zirkelbach will testify to the factual allegations of Paragraph 32.

The Amended Complaint of the Plaintiff begins with Paragraph 33, and the information supplied herein will follow this same sequence.

33. Proof as heretofore set forth will be used, together with the witnesses heretofore named for proof of the allegations of this Paragraph.

34. The allegations of this paragraph will likely be admitted by Defendants, but J. F. W. Zirkelbach will be available to testify to the pertinent allegations thereof.

35. The allegations of this paragraph also are expected to be admitted, but J. F. W. Zirkelbach can testify to these facts.

36. It is expected that the allegations of this paragraph will be admitted by the Defendants.

37. It is expected that the allegations of this paragraph will be admitted by the Defendants.

38. It is expected that Defendants will admit the allegations of this paragraph.

39. It is expected that the Defendants will also admit the allegations of Paragraph 39.

[fol. 75] 40. It is expected that the Defendants will admit the allegations of Paragraph 40.

41. It is expected that the Defendants will admit the allegations of Paragraph 41.

42. It is expected that the Defendants will admit the allegations of Paragraph 42.

43. J. F. W. Zirkelbach will be available to testify in support of the allegations of Paragraph 43. Also, it is expected that representatives of other distributors, whose

names are not now known, will be available to testify to matters explanatory of the allegations contained in this numbered paragraph.

44. It is expected that the allegations of this numbered paragraph will be admitted by the Defendants.

45. J. F. W. Zirkelbach will testify to matters alleged in this paragraph which are not admitted by Defendants.

46. The allegations of this paragraph are expected to be admitted insofar as the official order is concerned, and J. F. W. Zirkelbach will be available to testify as to the practical application of the Order, as will a representative from Foremost Dairies, Mr. Corwith Davis, and perhaps representatives of other distributors who are now unknown to the Plaintiff.

47. J. F. W. Zirkelbach will be available to testify to the pertinent allegations of this paragraph which are not admitted by the Defendants.

48. It is expected that J. F. W. Zirkelbach, T. C. Jacoby, and perhaps other witnesses peculiarly expert in the milk marketing and distribution field, and peculiarly expert in the milk industry, whose names are not now known to the Plaintiff, will be called as witnesses and in addition thereto, it is expected that recognized governmental periodicals and pamphlets supplied by the Department of Agriculture and other governmental agencies, which will supply statisti-
[fol. 76] cal data pertinent to the issues in this Cause, will be submitted in evidence or used in connection with testimony of experts in this field and it has previously been agreed by all counsel that the article contained in February, 1962, Nation's Business, entitled "Dairy Products Present Problems"—Agriculture—which deals with the mounting production and shrinking consumption of dairy products, together with the matter of government purchases of surpluses, will be submitted into evidence, and it is requested that the Court take judicial notice of the surpluses in milk and dairy products which has existed in the United States in the past few years. It is further expected that the Fluid Milk and Cream report, dated January 16, 1962, prepared

by the United States Department of Agriculture, as well as Exhibit "S" from Dow-Jones News Service and Exhibit "T" from Commodity News Service, attached to the Amended Complaint, will be submitted, as well as the article appearing in the December 18, 1961, issue of The Wall Street Journal at Page 12 dealing with dairy products.

It is expected that the allegations will be admitted insofar as the allegations of the Official Order described in this numbered paragraph are concerned.

49. The allegations of this numbered paragraph are expected to be admitted by Defendants, other than the conclusion of law that the tax is unconstitutional.

50. The same witnesses and proof are expected to be used in support of the allegations of this paragraph as heretofore set forth in support of the allegations of paragraph numbered 48, except it is expected that the Defendants will admit the issuance of the Order described therein.

51. It is expected that all of these allegations will be admitted by the Defendants, except that since the allega- [fol. 77] tions contained in this paragraph were written, a Rule to Show Cause why its license should not be revoked has, in fact, been served on the Plaintiff, and the same will be scheduled for a hearing in the near future.

52. J. F. W. Zirkelbach will testify as to the factual allegations of this paragraph. That in addition to Witness Zirkelbach, it is expected that officers of other corporations distributing milk in Florida will testify that no emergency exists in the State of Florida insofar as the supply of wholesome milk is concerned. It is expected that the witness, T. C. Jacoby, will likewise so testify.

Issues Involved.

The issues involved in this Cause, as counsel view them, are as follows:

1. The taxation of milk delivered to military reservations over which the United States Government has exclusive jurisdiction is prohibited by the Constitution of the United States.

2. Chapter 501, Florida Statutes, is unconstitutional.

3. Chapter 501.13(8) is unconstitutional and violates the Constitution of the United States.

4. The provisions of Chapter 501, Florida Statutes, as applied to the Plaintiff, are unconstitutional and are in violation of the Constitution of the United States.

5. All orders issued to Plaintiff pursuant to the provisions of Chapter 501, Florida Statutes, are unconstitutional.

6. The Order described as Official Order Pensacola-4 is invalid in that there was no emergency in existence as was found as a fact by the Milk Commission.

7. Official Order #20-28 is invalid in that there was no emergency in existence as was found as a fact by the Milk Commission.

[fol. 78] 8. There is a likelihood of irreparable injury to the Plaintiff because of penalties which are likely to be assessed against it pursuant to Chapter 501, Florida Statutes.

9. That Plaintiff is likely to suffer irreparable injury in that any tax recovered from it illegally or penalty assessed against it cannot be satisfied in damages against the State of Florida, as the same enjoys governmental immunity.

Beall and Caro, Florida National Bank Building, Pensacola, Florida, By Philip D. Beall;

Jones and Harrell, Suite 505, Florida National Bank Bldg., Pensacola, Florida, By Joe J. Harrell, Attorneys for Plaintiff.

Certificate of service (omitted in printing).

[fol. 79]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

T. Civil No. 851

[Title omitted]

DEFENDANT'S PLEADINGS FILED IN COMPLIANCE WITH PRE-TRIAL ORDER—Filed March 7, 1962

In compliance with that pre-trial Order dated February 21, 1962, and entered by the Honorable Harrold Carswell, District Judge for the Northern District of Florida, the Defendants, Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, shall hereinafter set forth the names of witnesses as the same are known to it at this time, together with a brief resume of the testimony expected to be elicited from each:

E. C. Allen
Lawrence Roberts
Howard Walton

all of whom are expected to testify to milk data and statistics utilized by the Defendants relating to production and sale of milk from producer to distributor in the Pensacola milk marketing area.

M. D. Lamb, Jr. of Horne & Rhodes, 102½ South Monroe Street, Tallahassee, Florida, Attorneys for the Defendants.

Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 80]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

[Title omitted]

MOTION OF DEFENDANTS TO DISMISS—Filed March 9, 1962

Come now the Defendants, by and through their undersigned attorneys, and move this Honorable Court as follows:

To dismiss the Complaint filed herein because of lack of jurisdiction over the subject matter for the reason that the Complainant has failed to exhaust the remedies afforded it in the Courts of the State of Florida and is, therefore, prematurely before this Honorable Court.

M. D. Lamb, Jr. of Horne & Rhodes, 102½ South Monroe St., Tallahassee, Florida, Attorneys for the Defendants.

Certificate of service (omitted in printing).

[fol. 81]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

[Title omitted]

MOTION OF DEFENDANTS TO STRIKE—Filed March 9, 1962

Come now the Defendants, by and through their undersigned attorneys, and, subject to the Motion to Dismiss filed herein, move this Honorable Court as follows:

To strike paragraphs numbered 6 through 16 of the Complaint filed herein for the reason that the allegations con-

tained in said numbered paragraphs have since become moot and are no longer material or pertinent to the issues before this Honorable Court.

M. D. Lamb, Jr. of Horne & Rhodes, 102½ South Monroe St., Tallahassee, Florida, Attorneys for the Defendants.

Certificate of service (omitted in printing).

[fol. 82]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

[Title omitted]

ANSWER OF DEFENDANTS—Filed March 9, 1962

Come now the Defendants, by and through their undersigned attorneys, and, subject to the Motion to Dismiss and Motion to Strike filed herein, for answer to the Complaint and Amended Complaint say:

1. The Defendants admit lines 1 through the word "Statutes" in line 4, and deny the balance of paragraph 1 of said Complaint.

2. The Defendants are without knowledge as to the allegations contained in paragraph 2 of said Complaint and, therefore, deny the same.

3. The Defendants admit the allegations contained in paragraph 3 of said Complaint.

4. The Defendants admit the allegations contained in paragraph 4 of said Complaint.

5. The Defendants admit the allegations contained in paragraph 5 of said Complaint.

6. The Defendants admit the allegations contained in paragraph 6 of said Complaint.

7. The Defendants are without knowledge as to the allegations contained in paragraph 7 of said Complaint and, therefore, deny the same.

8. The Defendants are without knowledge as to the allegations contained in paragraph 8 of said Complaint and, therefore, deny the same.

[fol. 83] 9. The Defendants are without knowledge as to the allegations contained in paragraph 9 of said Complaint and, therefore, deny the same.

10. The Defendants are without knowledge as to the allegations contained in paragraph 10 of said Complaint and, therefore, deny the same.

11. The Defendants are without knowledge as to the allegations contained in paragraph 11 of said Complaint and, therefore, deny the same.

12. The Defendants are without knowledge as to the allegations contained in paragraph 12 of said Complaint and, therefore, deny the same.

13. The Defendants deny each and every allegation contained in paragraph 13 of said Complaint.

14. The Defendants deny each and every allegation contained in paragraph 14 of said Complaint. The Defendants are without knowledge as to the allegations contained in paragraph 14 (a) of said Complaint and, therefore, deny the same.

15. The Defendants are without knowledge as to the allegations contained in paragraph 15 of said Complaint and, therefore, deny the same.

16. The Defendants are without knowledge as to the allegations contained in paragraph 16 of said Complaint and, therefore, deny the same.

17. The Defendants admit lines 1 through 16 of paragraph 17 of said Complaint, and are without knowledge as to the balance thereof and, therefore, deny the same.

18. The Defendants admit the allegations contained in paragraph 18 of said Complaint.

19. The Defendants admit lines 1 through the word "section" in line 4 of paragraph 19 of said Complaint, and deny the balance of the same.

[fol. 84] 20. The Defendants admit the allegations contained in paragraph 20 of said Complaint.

21. The Defendants deny each and every the allegations contained in paragraph 21 of said Complaint.

22. The Defendants admit lines 1 through the word "Florida" in line 7 of paragraph 22 of said Complaint and deny the balance thereof.

23. The Defendants deny each and every the allegations contained in paragraph 23 of said Complaint.

24. The Defendants are without knowledge as to the allegations contained in paragraph 24 of said Complaint and, therefore, deny the same.

25. The Defendants deny each and every allegation contained in paragraph 25 of said Complaint.

26. The Defendants deny each and every allegation contained in paragraph 26 of said Complaint.

27. The Defendants deny each and every allegation contained in paragraph 27 of said Complaint.

28. The Defendants are without knowledge as to lines 1 through the word "volume" in line 3 in paragraph 28 and, therefore, deny the same, and deny the balance thereof.

29. The Defendants are without knowledge as to the allegations contained in paragraph 29 of said Complaint and, therefore, deny the same.

30. The Defendants deny each and every allegation contained in paragraph 30 of said Complaint.

31. The Defendants deny each and every allegation contained in paragraph 31 of said Complaint.

32. The Defendants are without knowledge as to the allegations contained in paragraph 32 of said Complaint and, therefore, deny the same.

33. The Defendants, in answering paragraph 33 of the Amended Complaint, re-allege the above answer as to the re-alleged allegations of the original Complaint.

[fol. 85] 34. The Defendants admit the allegations contained in paragraph 34 of said Amended Complaint, and further say that the substance thereof is the subject of pending litigation in the Circuit Court in and for Hillsborough County, Florida.

35. The Defendants admit the allegations contained in paragraph 35 of said Amended Complaint.

36. The Defendants admit the allegations contained in paragraph 36 of said Amended Complaint.

37. The Defendants admit the allegations contained in paragraph 37 of said Amended Complaint.

38. The Defendants admit the allegations contained in paragraph 38 of said Amended Complaint.

39. The Defendants admit the allegations contained in paragraph 39 of said Amended Complaint.

40. The Defendants admit the allegations contained in paragraph 40 of said Amended Complaint.

41. The Defendants admit the allegations contained in paragraph 41 of said Amended Complaint.

42. The Defendants admit the allegations contained in paragraph 42 of said Amended Complaint.

43. The Defendants deny each and every allegation contained in paragraph 43 of said Amended Complaint.

44. In answer to the allegations contained in paragraph 44 of the Amended Complaint filed herein, the Defendants are without knowledge as what is meant by the word "plan" and, therefore, deny the same.

45. The Defendants deny each and every allegation contained in paragraph 45 of said Amended Complaint.

46. The Defendants deny each and every allegation contained in paragraph 46 of said Amended Complaint.

47. In further answering the Amended Complaint filed herein, the Defendants admit lines 1 through 31 and lines 48 through 57 of paragraph 47 and are without knowledge as to the balance of paragraph 47 and, therefore, deny the same.

[fol. 86] 48. The Defendants are without knowledge as to the allegations contained in paragraph 48 of said Amended Complaint and, therefore, deny the same.

49. The Defendants admit lines 1 through 17 of paragraph 49 of said Amended Complaint and deny the balance thereof.

50. The Defendants admit the allegations contained in line 1 through the word "commission" in line 6 of paragraph 50 of the Amended Complaint filed herein and deny the balance thereof.

51. The Defendants deny each and every allegation contained in paragraph 51 of said Amended Complaint.

52. The Defendants admit lines 1 through the word "producer" in line 3 and deny the balance of paragraph 52 of said Amended Complaint.

53. In further answering the Complaint and Amended Complaint, the Defendants specifically deny each and every allegation contained therein which is not specifically admitted, and demands strict proof thereof.

M. D. Lamb, Jr. of Horne & Rhodes, 102½ South Monroe St., Tallahassee, Florida, Attorneys for the Defendants.

Certificate of service (omitted in printing).

[fol. 87]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

POLAR ICE CREAM & CREAMERY COMPANY, Plaintiff,

vs.

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE, and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida, Defendants.

Transcript of Proceedings—March 12, 1962

Before:

Honorable Warren L. Jones, United States Circuit Judge,

Honorable Dozier A. DeVane, United States District Judge,

Honorable G. Harrold Carswell, United States District Judge,

Sitting as a Three Judge Court.

[fol. 88] APPEARANCES:

Philip D. Beall, Esq., Beall & Caro, Pensacola, Florida,

Joe J. Harrell, Esq., Jones & Harrell, Pensacola, Florida,

J. A. McClain, Jr., Esq., Mabry, Reeves, Carlton, Fields & Ward, Tampa, Florida, Attorneys for Plaintiff;

Mallory E. Horne, Esq., Horne & Rhodes, Tallahassee, Florida,

Marion D. Lamb, Jr., Horne & Rhodes, Tallahassee, Florida, Attorneys for Defendants.

[fol. 89]

COLLOQUY BETWEEN COURT AND COUNSEL RE: ISSUES INVOLVED

Judge Jones: I need not say, of course, that this Court has been convened for the purpose of hearing the trial of Polar Ice Cream & Creamery Company, against Andrews and others as members of the Florida Milk Commission.

It seems to the Court that to the extent that there are fact issues—there are probably not many of them and are rather narrow issues, and there were some of these disposed of at the pre-trial conference—I wonder if it would be helpful if counsel would for the purpose of the record indicate as to what they regard as being the questions that may be in dispute, and the facts involved which may not be in dispute for the purpose of narrowing to the extent that we can, the legal questions which this cause presents.

I will hear from the plaintiff along that line if plaintiff is willing to approach it in that fashion.

Mr. Harrell: Yes, sir, Judge. I would like, before I start, to introduce Mr. Joe McClain of a firm in Tampa, [fol. 90] Florida, who does not appear as counsel of record, but we would like for the Court to recognize him as participating as counsel, together with Philip D. Beall.

Mr. Horne: We have no objection, Your Honor.

Judge Jones: We are very happy to have you with the Court.

OPENING STATEMENT FOR PLAINTIFF BY MR. HARRELL AND COURT'S REMARKS

Mr. Harrell: I have worked with Mr. Horne prior to the time this case has come before this Honorable Court, and certainly with the assistance of Judge Carswell at two preliminary hearings, that we have had and I believe that it would be of help, both for the record, and for the inter-

est of time, for us to see if we could agree on the factual issues that would not be contested.

I have discussed the matter briefly with Mr. Horne, and the first issue that I will state to the Court as being agreed upon insofar as the order of proof is concerned, is the ques-
[fol. 91] tion of the exclusive jurisdiction over certain military installations. We have tried to obtain from the Secretary of State a more accurate information than we have at hand now, but this has not been sent to us by the Secretary of State. However, we have certain letters which Mr. Horne has seen, and which he has agreed with me, if I understand our agreement, that they may be introduced without objection. He only wishes that the Court will not read into these letters that the legal conclusion which some of the letters reflect. Is that correct, Mr. Horne?

Mr. Horne: May it please the Court, that is correct. Now, as I understood the Court, I suggest that we point out the areas where a factual dispute exists, so that the Court can understand where we really are in factual conflict, rather than where we are in accord.

Judge Carswell: It was my understanding that we were through with military milk questions, Mr. Harrell.

[fol. 92] Mr. Harrell: No, sir.

Judge Carswell: How did I get off on that?

Mr. Harrell: Well, Your Honor, you will recall that at our last hearing, the Court entered an order, and both Mr. Horne and I overlooked this very pertinent fact, and I, a day or two later, wrote the Court, and that is—that military milk is being considered because the State of Florida imposes a tax of one and one-half cent per gallon—one and one-half mills—excuse me—one and one-half mills per gallon on each gallon of milk delivered to military installations, and we take the position that the distributor does not owe that tax, and that the State of Florida has no right to impose that tax on milk delivered to military installations, exclusive jurisdiction of which has been ceded to the United States.

So that becomes an issue in this case.

Judge Carswell: Well, will you answer my question. I merely want to clarify the record here for the entry of that
[fol. 93] particular pre-trial order, which we did as you

say, came on for a preliminary hearing, and my understanding was that counsel represented at that hearing that issue was completely out of the case at that time.

Is that not correct?

Mr. Harrell: That is correct, Your Honor, except I think that they wish to contest the position that we do not—that they do have the right to impose the tax now of one and one-half mills on each gallon of milk delivered to a military installation. And that becomes one of the questions to be decided by this Court.

Mr. Horne: The right to collect the regulatory fee is known to the Court, and I think the existence of military order, which was the original pitch of your complaint, is now removed, and the Court ruled so on the suggestion of both of us.

Judge Jones: There is no question, now, of the right of the distributor to buy milk from outside the State for [fol. 94] the purpose of complying with the contract for the sale to military installations?

Mr. Horne: That is correct, Your Honor. The Milk Commission takes no position in that, whatsoever.

Mr. Harrell: Well now, just for the record, Your Honor, and so that we will have no misunderstanding about it—does the Milk Commission also take the position with respect to military milk that Polar Ice Cream & Creamery Company does not have to pay 61¢ per gallon for Class 1 delivered to the military installations?

Mr. Horne: That is correct.

Judge Carswell: Well, why not stipulate on this record, if they are not, let's have them stipulated now. I am saying this because I entered the pre-trial order, and it was done upon the assumption that this would be made a part of the record, and I would like to have that so stipulated and clarify this record in that regard.

[fol. 95] Mr. Harrell: Your Honor, so that there will be no doubt about it at all, I would like to make one further observation.

Judge Carswell: All right, sir.

Mr. Harrell: And that is, I would like to know whether or not the Milk Commission takes the position that Florida milk that is delivered to a military installation does not have to be purchased for 61¢?

Mr. Horne: In the first place, we take the position that you would be unauthorized to take milk of Florida producers and translate it into military installations at a lesser price; that it must go first to the higher position of Class 1 defined milk. We do not know which was the fulcrum of your position in the Federal Court in the first instance, prohibits you or suggests that we take any part in the purchase of out-of-state milk for the fulfillment of military contracts.

[fol. 96] Mr. Harrell: I believe that that clarifies the issues insofar as the military contracts are concerned.

Judge DeVane: But you haven't wound up the question of the tax?

Mr. Harrell: No, sir. We take the position that they haven't the right to tax it.

Mr. Horne: We take the position that we collect the regulatory fee as defined in the statute on all the milk distributed through the plant of Polar Ice Cream & Creamery Company, plaintiff here.

Judge Jones: But for your choice of words you do not concede that it is a tax?

Mr. Horne: No, sir. I do not.

Mr. Harrell: I believe now, Your Honor, that I would like, while we are still on the military milk, I have letters [fol. 97] here touching each of the military installations which we have set forth in our amended complaint, with the sole exception of the military installation at the Naval Mine Laboratory in Panama City. We do not have information with respect to that installation, although we verily believe that it, too, was ceded to the United States. We have written the Judge Advocate General, we have written the Navy Department, we have written the Secretary of State, in order to get this information, but we have not been able to ascertain that as yet.

Judge Carswell: There is a file in the United States Attorney's office, Mr. Harrell.

Mr. Harrell: I also asked Mr. Eggart if he could supply the information, and it was from Mr. Eggart that I got the information about Tyndall Field, but Mr. Eggart said, "I would rather not get into this thing". However, Your Honor, I think is susceptible of proof, and before the day

is over, I believe we can get the necessary information [fol. 98] from the Secretary of State, but I am a little embarrassed about it because we don't have it now.

Now, there is another area I think it would be well to clarify the Milk Commission's position. In, I believe, it is paragraph numbered 43 of our amended complaint—we have alleged in that paragraph "that since the Pensacola milk marketing area came under the alleged jurisdiction of the Florida Milk Commission, the Florida Milk Commission has at all times taken the position that the plaintiff must buy all of its requirements of milk from Florida producers at a price to be fixed by the Florida Milk Commission, and in accordance with a ratio schedule set up by the Milk Commission to be applied to each Florida milk producer. Out-of-State milk could not be purchased by plaintiff, in accordance with the interpretation of the law by defendants, until after all Florida milk, including surplus milk which might be shipped from any place in Florida to the plaintiff, had been exhausted."

Now, in answer to that particular allegation, the plaintiff [fol. 99] in their answer state that plaintiff denies each and every allegation contained in paragraph 43 of said amended complaint.

I would like to know, and I think it would be of aid to the Court, if the Milk Commission takes the position—does not take the position as we have alleged it, or if they would clarify exactly what their position is with respect to this matter. I think it would certainly eliminate much proof if we could get a clarification of that particular position; because frankly, I think that is the base rub of this case, and we might as well get right to it.

Opening Statement for Defendant by Mr. Horne and Court's Remarks

Mr. Horne: May it please the Court, the position of the Florida Milk Commission is that they simply have never taken the position alleged by the plaintiff. That there has never been any indication, written, or oral, or otherwise, that in any way prohibited or disapproved of their position of out-of-state milk, nor by indirection has the Florida Milk Commission ever suggested that should they purchase

milk from out-of-state sources that they could not do so [fol. 100] unless they paid the producers in the other jurisdictions a price established by the Florida Milk Commission to Florida producers. The Milk Commission has never communicated such an intent to the plaintiff, and certainly never tried to enforce it.

Judge Jones: But does it not say that it is without power to make such a requirement if it sees fit?

Mr. Horne: If I understand your question, the Milk Commission also admits that it is powerless to do so in the future.

Judge Carswell: That is predicated upon the assumption that you do have the right asserted, here, to compel the purchase of certain milk from the producers within Florida, am I correct?

Mr. Horne: Yes, sir. We do assume the position that we might require a plant located in Florida, with a base relationship with Florida producers, to buy its base rela- [fol. 101] tionship of milk from the Florida producers, and beyond that they can purchase any amount—

Judge DeVane: Now, let's get that "beyond that". Suppose they can buy from Florida producers all the milk they want for all their sales to military installations, and otherwise.

Mr. Horne: Yes, sir.

Judge DeVane: Is it your position that you can require them to do that?

Mr. Horne: It is our position that we can require them to buy from their Florida producers to the extent of the base relationship established by and under the law of this State. Yes, sir.

Judge DeVane: That is the real hub of this controversy, isn't it?

[fol. 102] Mr. Horne: Well, it is, unless they abandon 43—unless they endeavor to prove under their paragraph 43 that we try to prohibit out-of-state acquisition under any circumstances.

Judge DeVane: Well, no, you concede that you don't do that if they need it. But my question went to the fact—if they can get all the milk they need for all the sales they

make from Florida producers, are they required to buy that milk before they buy any from out-of-state producers?

Mr. Horne: Your Honor, I am afraid we might be toying with words. I will have to answer your question, "no". We do not contend that plaintiff would not have to envision surplus situations in other parts of Florida prior to purchasing out-of-state milk. This is a rather delicate economic balance and I would first have to explain the base relationship between a distributor and his producers, to answer fully your question.

It is as briefly and simply as this: That during a given [fol. 103] specified period of time the Class 1 sales—Class 1 sales are generally defined as milk going into consumer outlets, sales in bottles to your housewife at the store, generally that is Class 1 utilization—those sales during this base setting period are determined to be a Class 1 utilization.

Now then, insofar as the producers of Florida are supplying that need, they each have a representative percentage-wise proportion of that class which has become their base relationship.

Judge Jones: Relationship to the entire market?

Mr. Horne: That's the relationship between the distributor and the producer, Your Honor, insofar as Class 1 sales are concerned. This is identically though, Your Honor, this is identically the definition of Class 1, Class 2, Class 3, and Class 4 of the Federal Milk Marketing order, which has become in the last ten to fifteen years a matter of economics, the answer to this complex problem.

[fol. 104] Judge Carswell: Mr. Horne, as a matter of boiling it down a little more concretely, in answer to Judge DeVane's question to you—I believe we had this brought up before—

Mr. Horne: Yes, sir.

Judge Carswell: —about the surplus of milk, for example, in Tampa.

Mr. Horne: Yes, sir.

Judge Carswell: Can Mr. Zirkelbach, Polar Ice Cream Company, be compelled to take that surplus milk before he can purchase from Alabama?

Mr. Horne: No, sir. No, sir.

Judge Carswell: Now, the next question: Can he be compelled to take surplus milk that might be produced in the Tallahassee area before he buys elsewhere?

[fol. 105] Mr. Horne: He cannot.

Judge Carswell: Now, finally, can he be compelled, under your position, to purchase from those gentlemen whose names are listed here, Messrs. Ard, and so forth, by that formula percentage-gallonage in the Pensacola area before he buys from across the line at Brewton, and so forth?

Mr. Horne: Yes, sir.

The Court: He must do that?

Mr. Horne: Let me define that one step further. He cannot be required to buy surplus milk in the Pensacola area, except from his own producers. Those listed as his own producers.

Judge Carswell: Those listed as his own producers?

Mr. Horne: Those listed as his own producers, and to [fol. 106] Class 1 utilization thereon.

Judge Carswell: And those specifically named people. Not any producers that might be under the jurisdiction of the Commission in Key West or Tampa, Jacksonville, or Tallahassee? Not anywhere except in this area, is that correct?

Mr. Horne: Those that are his producers.

Judge Carswell: All right.

Mr. Horne: Now then, so that the Court nor counsel won't misunderstand, there is a broad area of cooperation, the distributors will call the Milk Commission and say, "I need so many gallons of milk" and they will then put them in contact with a distributor or an area, marketing area, that is in surplus and then that need will be filled, but not under compulsion.

Mr. McClain: Your Honor, may I say one thing here [fol. 107] with the permission of co-counsel?

Judge Carswell: Yes, sir.

Mr. McClain: It seems to me there is a two-fold question. One is this—does the Commission take the position with respect only to the Pensacola Milk Marketing area, that the Polar Company must take all the milk tendered by Florida producers? That is question number 1. I am talking about Pensacola Florida producers.

Number 2. They have sent out certain bases of quotas with respect to the producers who serve the Polar plant; and, I believe, they are taking the position that with respect to those percentages, those producers get the first cut of the pie. They have got to have that percentage of Class 1 sales; that is, the highest sales of milk for drinking purposes to the consuming public, which, of course, means preferential treatment to the Florida producers. And as they set out these base relationships and quotas, first, the Polar Company has got to say:

[fol. 108] 1. We take all the milk as to milk that we sell in Class 1 channels. We first, before anybody out-of-state gets any look-in on these Class 1 sales, these Florida producers in the Pensacola area must have first call and get this percentage of Class 1 prices. Now, I think, those are the basic primary questions here, and I think they are not clarified with respect to the position of the Commission.

Mr. Harrell: Your Honor, to supplement that I believe it would be of assistance to the Court if you would turn to Exhibit "L" which sets up this ratio relationship and, also, it ends with a percentage of 100%, so that it would seem to appear, at least to the distributor, that it is expected that he takes 100% of his need from Florida producers in accordance with this ratio schedule.

I think certainly that is a reasonable assumption; that is, an assumption that he makes, and we would like to know whether or not the Milk Commission takes a position [fol. 109] with respect to that one way or the other?

Judge DeVane asked the original question but that, I think, still has not been exactly clarified by Mr. Horne.

Mr. Horne: Of course, the percentage is inept in fully explaining what is to happen, unless it relates to something. In determining the base relationship in percentages, which is the Florida method of approaching this situation, we took the contractual situation in existence prior to the assumption and jurisdiction by the Florida Milk Commission, translated that, not to this plant's sales in Alabama, we translated it to the sales of milk in Florida only, and came up with this percentage. So that this is not a percentage—

Judge Carswell: You mean sales by these people? Turn it the other way around—you mean, purchases by Polar Ice Cream without reference to Alabama? Is that what you are saying?

[fol. 110] Mr. Horne: This relates to sales, Your Honor, rather than purchases from producers. This figure of 100% to which Mr. Harrell has alluded, was arrived at as a result of a calculation from their own contractual experience these people were involved in, prior to the assumption of control by the Milk Commission.

We took their contract, we took the Class 1 sales; that is, to the people in houses and the stores, we took the Class 1 sales in Florida only—bearing in mind now that this plant, the plaintiff, had sales in Alabama, but we didn't let our Florida producers participate in that because we felt that we should not. We took the Florida sales, Class 1 sales, and divided it into a percentage and translated it into Florida producers. That is all they did.

It is not an effort to take advantage of the total sales. It is exactly what these people were doing by a running arrangement prior to assumption of control by the Milk Commission. That is what this 100% is.

[fol. 111] Judge Carswell: Well, you want it frozen then?

Mr. Horne: We believe, yes sir, that the Florida producers are entitled to a base relationship of this plan. Otherwise, these producers are wiped out many of them. And in the multitude of decisions of the Supreme Court of the United States, it being the effort of the State to protect these producers to the extent of involvement and prior course of business experience is justified, is constitutional, and is proper for a State to accomplish.

Mr. McClain: I want to say one thing. I have not heard an answer to the question as to whether Polar has to take all the milk tendered by the Pensacola, Florida, producers? That is the first question I think we need an answer to, the position of the Commission on that.

2. At the end of the month the Polar Company accounts to its producers, its Florida producers?—Now, it takes all [fol. 112] of the sales that it has made in Class 1, and what this percentage is saying is, you have got to fill this percentage of Class 1 sales in Florida, at least, (they now say

they confine it to Florida) to the Florida producers. And then they say blithely, that that doesn't affect in Alabama.

But the point is, no matter whether Alabama milk was sold here, or Mississippi, or what have you, the first call on the Class 1 sales percentage-wise is stated in this formula, they are the people who get the first call on Class 1.

Now, I say it is a two-fold question that we must have the answer to. And the Commission has taken the position historically that the distributor must take all of the milk, and we went to the Supreme Court of Florida on it, and it is still in the bosom of the Court with respect to that. And this percentage basis is very clear in what they are saying, that the Florida Pensacola producers get the first call percentage-wise on this milk sold in Florida, no matter from whence it comes.

[fol. 113] Mr. Harrell: And, of course, the Court will easily see this is a percentage ratio. For example, they don't say, "well, you bought a thousand gallons from John Doe last year, so you have got to buy a thousand gallons from John Doe this year." No, it is a percentage—if he sold two thousand gallons in the ratio, then he must buy two thousand gallons from John Doe in Florida.

There is one of the evils of the thing, because it is a percentage ratio. They are saying purely and simply, as I understand the issue, this is the nub and heart of the case, they are saying, "you have to take 8.784 percent of your Class 1 sales and buy that from John Adkinson, Mr. Zirkelbach". And we can easily compute it. At the end of the month if you have a hundred thousand dollars in sales, you have got to have 8.784 thousand percentage of that sales to go to John Adkinson.

And another thing they say, you have got to pay Mr. John Adkinson 61¢ per gallon for each of those gallons, even though you can go across from Pensacola, (I want the record to show in Pensacola we are right virtually [fol. 114] on the Alabama line) even though you can go over to Alabama and buy the same grade of milk with the same wholesomeness for 40¢ a gallon, you are prohibited from doing that. You have to buy that 8.784 percentage of your Class 1 sales from John Adkinson, who is a Florida producer, and you have to pay him 61¢ a gallon.

And you cannot go across the Alabama line in your truck and pick up that 40¢ a gallon Alabama milk, although it is just as wholesome, although it has to test just as high in butter-fat content, you are prohibited from doing that, and we forbid you from doing it. And that, of course—

Judge Jones: You are telling us what you understand the Commission's position to be?

Mr. Harrell: Yes, sir, that is what I understand. If I am wrong, I certainly would appreciate it if they would correct me in my misunderstanding, Your Honor, because up to now, Mr. Horne—although perhaps I am a little dense—he has not made it clear to me whether or not [fol. 115] they are not taking that position as I have stated as I understand it, and I would like for him to let us know, before we proceed further if my understanding is correct.

And Judge DeVane asked the original question, and it has not been answered, I am sure, to his satisfaction or to mine up to now.

Judge Jones: I think he paused for breath to baste.

Mr. Horne: Your Honor, if I understand what we are now doing, trying to define the areas which factually exist and we are in conflict.

Judge Jones: Well, we have got to go beyond that apparently in trying to develop legal issues involving things done before we begin taking testimony.

Mr. Horne: If I could very briefly try to outline what I concede to be the real focus of our controversy.

Judge Jones: Approach it, Mr. Horne, if you can, either [fol. 116] at the beginning, or as you finish up—the conflict of Mr. Harrell's understanding of it.

Mr. Horne: All right, sir. I will address it to his understanding, first.

If his position is properly submitted in the writing of his paragraph 43, of his amended complaint, and if his position is properly stated in paragraph 46 of the amended complaint, where he broadly states that we require him to accept surplus milk to meet all of its requirements until the supply of all surplus Florida milk has been exhausted. Then we are involved in a factual dispute insofar as those representations are concerned.

I would suggest to the Court, as summarized by Judge Carswell, that the Florida Milk Commission recognizes and has never gone beyond this point, that:

1. It cannot prohibit the purchase or acquisition of wholesome milk extra-territorially by direction or indirection. That under the Seelig case, they can't tell him he has [fol. 117] got to pay any price for milk acquired extra-territorially. That we cannot require the plaintiff, or any other distributors, to purchase from the bounty of surplus milk in any Florida milk marketing area, including his own unless he should be desirous of doing so. So, no compulsion that he purchase surplus milk.

We do contend that the Florida Milk Commission has the authority and power by the enactment of this regulatory Act and the order reasonably enacted pursuant to that, to do this, to create a base relationship between the distributor and the producer in this State, so that the situation would exist where a distributor had producers reasonably expectant of producing sufficient milk to supply the Class 1 needs, only, of that plan.

And that, annually, or under some reasonable scheme, that base relationship might be re-adjusted.

I will pause here to say, these base relationships have been frozen in Florida for some number of years. And that, under this relationship, the Milk Commission can and does that.

[fol. 118] The Milk Commissions of a big majority of the states do say under this situation that you, Mr. Distributor, must accept the milk from your producers and attribute it so far as the percentages related here—you must Mr. A, you have 10%, that whatever your Class 1 sales may be as they fluctuate, dependent upon sales ability, whatever Class 1 sales are from time to time, A will receive 10% in volume of those sales and for that producer A will receive 61¢ per gallon, which is the currently existing price paid to producers for their milk.

Now the, from this point, the Florida Milk Commission under a statute which says in brief all surplus milk—all milk above Class 1, that the value to be set by this Regulatory Body must not exceed the value of the component parts of the milk.

Now, from this point on, the Florida Milk Commission has simply adopted the Federal Order pertaining to surplus milk and follows to the comma, and to the semi-colon their approach on this; which is, if Producer A produces more milk than he is entitled to receive Class 1 prices for, then [fol. 119] he is paid for it by the distributor on the utilization that that distributor is able in his best business practice to utilize it for.

And the Federal Order creates classifications 2, 3 and 4, with a descending price to be paid in each, and we insist the Florida Milk Commission by adopting that ratio, and if he sells it in Class 4 and dumps it, and uses it in fertilizer or something like that, he gets a very small price for his milk.

Now, nowhere in this scheme is there by direction or indirection, the admonition to this plaintiff not to buy out-of-state milk. In fact, he is buying now without any prohibition some sixty per cent of his milk there, because the Florida producers can't even touch his Class 1 sales we understand.

Judge Jones: Well, there is no prohibition against him buying out-of-state as long as he does the production of his producers for Class 1 utilization?

Mr. Horne: That is correct, Your Honor. That is correct. [fol. 120] Judge Jones: Well, now, I don't speak for the other members of the Court—am I correct in my assumption that the reason this Court has been convened is to test the constitutionality of this statute as applied by the Commission with respect to its effect on Interstate Commerce?

Mr. Harrell: That is one of the reasons—yes, sir—and we—

Judge DeVane: And the only reason?

Mr. Harrell: Well, that's correct. Also, since our original complaint, there were orders which were produced by the Commission, and, of course, we have attacked the validity of those orders having the same constitutional invalidity. I don't mean to complicate it.

In other words, the whole thing stems to the unconstitutional application as to this particular individual; and, also, [fol. 121] the unconstitutional provisions of the Act itself,

as well as, we attacked the whole Act. I was going to direct my attention to one segment of it in just a moment, and I assure the Court I will be brief, but I wondered if I could understand in just about one or two sentences whether or not we have Mr. Horne's position?

I didn't mean to interrupt.

Mr. Horne: May I suggest in closing, it will be more feasible.

In my judgment, the Supreme Court and other decisions have pretty closely chartered this area many times before. That could we approach this, maybe with the probability that we would avoid a factual trial on the issues involved, with the feeling that I might assume all the representations that we made with the sole exception of possibly 43, and argue the law involved to determine wherein we might be in error. If we could pursue it in that way without doing violence to the Court, I think we might be clearer on where we might be overstepping, and it might not.

[fol. 122] Judge Jones: Well, it seems to me we are getting a lot of what we used to refer to as "dog hair" in this case, which is beginning in my mind, to cloud and obscure what I started out with the notion of what was here involved.

Now, when it comes to supplying—comes to buying from the distributors of Polar's particular percentages in order to supply their local market, does that have any substantial bearing on the right to buy outside of the State of Florida?

Mr. Harrell: Yes, sir. It has this substantial, and this gets right to what it has taken Mr. Horne some fifteen minutes to explain—first, as I understand it, again, I can state my understanding in a very few words. As I understand it, they say you have to take all of the Class 1 requirements from Florida producers before you can go to Alabama and buy a gallon of milk.

Judge DeVane: You keep making that statement. You [fol. 123] may say that it is only the producers in the Pensacola area.

Mr. Harrell: Well, what I say—we will confine it then to the Pensacola producers, they are listed on Exhibit "L", and that will define it right to it.

Judge DeVane: That has been his answer.

Mr. Harrell: Right. Then the next question we are immediately confronted with is this. Suppose now that they bought a hundred gallons of milk from John Adkinson last month, John Adkinson increases his herd so he produces two hundred gallons—do they have to pay 61¢ for that extra hundred gallons they buy from John Adkinson when they can go over to Alabama and buy it for 40¢?

You see, Judge, that gets right to the point I think. They say they have to buy all of their Class 1 requirements in Florida, in accordance with the percentage ratio before they can buy a gallon of milk in Alabama.

[fol. 124] Judge DeVane: You are taking the position that the seller is sound, and can't increase his supply, is that right?

Mr. Harrell: No, sir. I am taking the position that if the producer, if this farmer, increases his supply, and all of the farmers, and Mr. Zirkelbach's company must first buy all of their milk—

Judge DeVane: Now, wait, you are stating it clearer than I did. They are taking the position—which you are denying—that these producers can't increase their quantity of sales to your client, and make you take it for the higher price, is that your position?

Mr. Harrell: Yes, sir.

Mr. McClain: I think we are missing one thing here, if I may say so.

For four years the Florida Commission has taken the position that the distributor must take every drop of milk [fol. 125] offered by the producers. They don't know what it is going to be; Class 1, 2, 3 or what have you, until it is sold.

Now, I am inquiring whether that is the current position?

Obviously, it is the position of the Florida Milk Commission that the Polar Company must take all milk produced, a billion gallons, ten million gallons, or what not.

Judge DeVane: You mean by its producers, Florida producers?

Mr. Harrell: Listed on Exhibit "L", Florida Producers, and that is right at our point.

Mr. McClain: Florida producers. Obviously, if it has to take all the milk from its Florida producers in Pensacola,

no matter how high it may go—they say, of course, you can go out of state and buy whatever you want; but first, you must take every drop produced here. Then, when you at [fol. 126] the end of the month account for your Class 1 sales, you then take these percentages and first give the Florida boys this percentage of the Class 1 sales, they come first.

That, I think has been the position for four years of the Commission, and I am ashamed and astonished.

Judge Carswell: If there is anything left over, he can buy it in Alabama, Mississippi, or anywhere else?

Mr. McClain: Right. First, they have to take every drop offered by the Florida principal producers—at the end of the month must give them the first cut on Class 1 sales according to these percentages.

Judge Jones: Is it considered by Polar that the Commission can require it to buy any milk in Florida for its Class 1?

Mr. Harrell: It is not conceded. No, it isn't conceded. We have no need for the Milk Commission. It has out-lived its usefulness, like the NRA and should be abolished.

[fol. 127] Judge Jones: Well, we won't hear too much of that argument here.

Is it contended by Polar, that with the statute still on the books, it is permitted to buy all of the milk that it chooses in Alabama, or other states, and bring it into Florida for the purpose of serving its Class 1 customers?

Mr. Harrell: That is correct. That is the basis.

Judge Jones: If that is the basis of the contention, then, aren't we getting that issue somewhat beclouded in here by something of Exhibit "L", whatever it is?

Mr. Harrell: No, sir, because, if the Court will permit me, I will get right into this situation by tying it into this particular provision.

Judge Jones: Well now, would this be an appropriate place to again inquire as to whether or not there are fac-

[fol. 128] tual issues?

Now, that's what we started out, the initial inquiry was whether or not there were fact issues and, if so, what are they, and we have now spent about forty minutes, and I don't know what the fact issues are, if there are any. And

if there are any, why, we can decide whether or not we need to resolve them before hearing the legal argument.

If we need to take testimony on them, we don't need to resolve them.

Mr. McClain: Your Honor, I think it comes to this that basic is this question, and I don't know whether the evidence is going to establish it. There has been a denial of certain allegations of the complaint.

There are two simple questions that the Milk Commission can answer today:

1. Does it require as its position, factually, that it requires the Polar Company to take all of the milk tendered by the Florida producers in the Pensacola area? That is a simple question.

2. Does it also require this—first, to account to them, [fol. 129] to the Florida producers, by the percentage of the quotas set down in this Exhibit "L", before they can pay any other people, regardless of where the money comes from, for Class 1 prices? In other words, do they have this preferential treatment?

First, must they take all of the milk? Of course, if you have got to take all of something, it doesn't leave you any room to buy anything elsewhere. It is saying that you are prohibited. That is the reason this fact question is important.

Judge Jones: Well now, you contend that you may not have to take all, but my question is, isn't it your position that you don't have to take any unless you are obligated by a contract to the producers?

Mr. Harrell: That is correct. That is basically our position.

Judge Jones: Well, do you have to maintain that position in order to succeed in this Court?

[fol. 130] Mr. Harrell: No, sir, we do not.

Mr. McClain: No, sir, we do not. The basic question I will get back to is we have to take all, Your Honor. All the milk. And if it exceeds all of our requirements for Class 1 sales, obviously we are precluded, the Commission is isolating, insulating, Florida producers from any milk coming in from outside.

Judge Jones: For the purpose of this case, what milk is Polar required to purchase in Florida concerning its Class 1 market?

Mr. Harrell: All produced by these producers listed on Exhibit "L". Every drop.

Judge Jones: What do you concede that you have to buy from them?

Mr. Harrell: We concede, Your Honor, before the Milk Commission went out we didn't have to buy any from them.

[fol. 131] Judge DeVane: That doesn't answer the question.

Mr. Harrell: Well, no. Your Honor, I am not trying to equivocate. Here is the thing, for example, they said the 8.784 ratio is gearing it to some particular time. That would be one thing. But that is not my understanding of what they say. They say, you have to buy that percentage of all the milk produced.

Judge Jones: I didn't make myself clear. You say that for the purpose of this case you don't have to rest on the proposition that you are not required to buy any?

Mr. McClain: Correct.

Mr. Harrell: Correct.

Judge Jones: Now, can anybody answer the question as to what you conceded that you may have to buy for the purpose of this case?

[fol. 132] Mr. McClain: Your Honor, we don't think it is any burden on us to indicate whether we have to buy a drop. We are complaining. And the basis, fundamental predicate in the premise is, they are telling us "you take all of the milk produced by the Florida producers, take all of it, and pay 61¢ for all Class 1."

Judge DeVane: You are confusing me by keeping on using the word "all".

Mr. McClain: Excuse me, Your Honor. When I say "all" I mean "all", every drop.

Judge DeVane: Well, you don't have to buy any more than you need?

Mr. Harrell: Yes, sir, every drop. That is what we are up here complaining about, Judge. They say "every drop they produce, you buy according to this ratio."

Judge Carswell: If you buy any at all?

[fol. 133] Mr. Harrell: I guess if he closed up his business, Your Honor, he wouldn't have to buy it, but as long as he is in business, he has got to take every drop.

Mr. McClain: May I make one simple statement. This very question, Your Honor, went to the Supreme Court of Florida. It was there held that the Milk Commission, under the statute, could make the distributor take all the milk, whether he needed it or wanted it. Now, in the posture of the case in which we find ourselves, that is the historic position, it is the opinion of the Supreme Court of Florida—I will be glad to read it to you, but I won't bother you at this moment—that when this is applied to the peculiar geographical situation in Pensacola, and we have in that particular situation geographically to take all the milk offered us by the Pensacola producers, whether we need it or want it, and then at the end of the pay period (which is usually monthly) we are audited. We must account for every gallon that we sold in Class 1 sales, and [fol. 134] give to the Florida producers the first call, percentage-wise on this list.

It is just as simple as that. We say that that posture alone, that position alone, which I have understood for four years, to be the position of the Milk Commission. I have not heard it disputed today. That interferes with Interstate Commerce, and that is the heart question in this case. That is all we have to show.

Judge Jones: You say that they have to buy everything that is produced by Polar's producers, whether they have got a market for it or not?

Mr. McClain: We have got a statute, Your Honor.

Judge Jones: That is what the Commission has ordered Polar to do?

Mr. McClain: And the statute orders it to do it too. The Legislature and the Commission.

[fol. 135] Judge Jones: Well, we are not required to do anything more than look at the facts; that is, an unconstitutional act that nobody is attempting to enforce isn't going to be enjoined up here, is it?

Mr. Harrell: They are attempting to enforce it in accordance with what I have stated to the Court to be my understanding, but I feel it is unconstitutional.

Judge Jones: Now, what has the Commission done to require Polar to purchase this milk from its producers for its Class 1 outlets in excess of its need for supplying the Class 1 milk?

What is it that they are required to exhaust first the production of its local producers before it can divert out-of-state milk into those channels?

Mr. McClain: Your Honor, if the Commission's position, and Your Honor's is, that we may reject any or all milk tendered by the Florida Pensacola producers, we would not be here. If they will just say that that is true, we will [fol. 136] just close the books and we will walk out of here.

On the other hand, if they will answer this simple question—do we have to take, and does the Commission take the position, under threat of jerking our license, that we must take every drop of the Florida milk produced by the Pensacola producers; then, we say that that interfering with Interstate Commerce, it is forcing us affirmatively to take all of the milk they produce—.

Judge Jones: Are these producers presently producing more milk than Polar can sell to its Class 1 customers?

Mr. McClain: I don't know that that is the case, Your Honor, but I think—

Judge Jones: Then, if it isn't the case, what difference does it make? If the question becomes academic as to what it may be able to do, doesn't it?

[fol. 137] Mr. Harrell: No, sir.

Judge Jones: Well, we are not called together here for the purpose of just answering questions as to whether under certain circumstances this act may be unconstitutional in its application, unless we are confronted with that sort of situation.

Mr. Horne: Could I take a swing at this, Judge? Mr. McClain, I am afraid is tipping over into philosophy. He has been associated in this case, on these pleadings, and I want him to confine himself to it in response to questions.

I want to say that this complaint says that "more than 70% of the milk distributed by plaintiff is produced without the State of Florida, a large part of which is further transported in Interstate Commerce." That means that less than

30% is being pounded on him by his producers by the Florida Milk Commission.

Judge Jones: Is there any distinction between the Class [fol. 138] 1 milk, and the other?

Mr. Horne: None here. We understand that his Florida producers can't even produce his Class 1 sales.

Judge DeVane: Well, what have we got to fight about?

Mr. Horne: Nothing, Your Honor.

Mr. Harrell: We have this to fight about, Your Honor—for example, that if we can buy milk in Alabama for 40¢ a gallon of the same quality of milk, do we have to pay 61¢ for every gallon that is produced here, every drop that is produced?

Judge DeVane: Now, you are arguing. You are paying 61¢ for certain milk, aren't you?

Mr. Harrell: Because we are forced to do it.

Judge DeVane: Because you are forced to. You don't [fol. 139] want to be required to buy any of your milk in Florida?

Mr. Harrell: That is what we would like to do.

Judge DeVane: You don't want to buy any milk from the Pensacola area producers?

Mr. Harrell: That is correct.

Judge DeVane: Now then, you will confine the issues of this case to that question, as to whether or not the Milk Commission has the authority under the law to require your company to buy any of its needs from Florida producers in the Pensacola area?

Mr. Harrell: Or putting it the other way, Judge, the issue is does it have to buy every drop of milk produced by these Florida producers.

Judge DeVane: Now, we haven't got that question. We have the other question. There's no reason for us concerning ourselves with that question. They don't produce enough [fol. 140] to meet their requirements. You can't say here that your producers, that the producers in the Pensacola area, produce all your company needs, and you have to pay 61¢ a gallon for it, but you could go into Alabama and get it for 40¢, and we want to buy the Alabama milk and sell it in Florida, then you would have an issue.

Mr. McClain: May I say one thing. I accept Mr. Horne and his word. Now, let's assume at the moment that the Polar Company is only receiving say 30% of its total milk receipts from Florida producers. This base arrangement that when you come to account at the end of that month for that 30% of the milk, you must pay at the rate of 61¢ a gallon for the percentage opposite each of these producers named of the total milk delivered to you that was sold in Class 1 sales.

Your Honor, economically—and I don't want to be philosophical—it simply means we are in a position whether it is 30% or 20%, we have got to take this milk, accept it, [fol. 141] and account for it at a higher price, 61¢, than it can be bought across the line. It doesn't make any difference whether it is a 30% or a 100% or a 101%, if we look at it economically and see the impact.

As Justice Cardozo said in a case that we will talk about a little later if we have an opportunity, "is jus. as much a threat to Interstate Commerce as custom use". Now, when we have to account for this at 61¢ a gallon, whether it is 30% of the Florida milk that is sold in Class 1 sales, or more, or less, it seems to me is not the point.

The percentage isn't the point. The fact that we have got to account at this price to these people, and they have first call on this Class 1 sales business.

Judge Carswell: And that percentage may or may not vary in accordance with the production of your producer; that is, the number of cows?

Mr. McClain: That is correct. Concededly it might be 30% now—it might be 40% two years from now—it might be 100% or it might be back to 10%.

[fol. 142] Judge Jones: Suppose it was 110%?

Mr. McClain: 110?

Judge Jones: Yes. Would you have to take it?

Mr. McClain: Yes, sir, we have to take all they offer us. The statute says that.

Judge Jones: Even if you don't have a Class 1 market?

Mr. McClain: It doesn't make any difference. We have got to take it, all of it. Now, the percentage of what is sold—

Judge DeVane: How do you have that in this case?

Mr. McClain: How's that?

Judge DeVane: How do you have that in this case?

[fol. 143] Mr. McClain: Why, Your Honor, we have a statute that says it. The Commission Order says it and they will cite us to show cause why our license should not be taken the moment we reject without reasonable cause, reasonable advance notice, and prove all that stuff as to why we don't take a drop of milk.

Judge Jones: Nothing of that is in this case?

Mr. McClain: Ask Mr. Horne, yes, sir.

Judge Jones: A Show Cause proceeding?

Mr. Harrell: We have got one pending now, Judge, it is set for the 21st of March, for your information. It was set for the 8th and Mr. Horne was ill and it was postponed to the 21st.

Mr. Horne: I want to say that it does not involve a single factor involved here, in this argument here. It did not arise out of this suit.

[fol. 144] Judge Jones: What is now pending in the State Court beside this Show Cause proceeding?

Mr. Horne: A battery of cases involving most of these questions, and some specifically in the class school milk question, the validity of that order.

Mr. McClain: Excuse me, Mallory, in the Supreme Court we have had these cases pending since '57, in which the question was first raised, Your Honor, as to whether a distributor has to take all of the milk tendered to him whether he wanted it or not. In that case, we attempted to raise the Interstate Commerce question, but they dropped Pensacola from that order. So that we didn't have Pensacola in it. Now, since they have brought Pensacola back into it, there is a Show Cause Order.

It is true that there are other problems involved in the Show Cause Order, but if Mr. Horne and the Commission are taking the position that we don't have to take all of this milk tendered to us in the Pensacola area, and don't [fol. 145] have to account first to these Florida producers this percentage of the Class 1 sales, and we may refuse to do that with impunity, then, of course, we can reject all of the milk we want to reject, and don't have to give this

preferential 61¢ price, and we can buy cheaper across the border, then we have got no business here, and they have got no business citing us to Show Cause.

Judge Jones: If the Supreme Court of Florida gets around to deciding the question of the cases pending before it, will it have made a pronouncement which would bear upon the issues in this case?

Mr. McClain: The case there does not involve the Pensacola area.

Judge Jones: I know, but the pronounced principles that would be governing insofar as the State Courts are concerned.

Mr. McClain: No, sir, except insofar as it would make the general pronouncement regardless or irrespective of Inter-
[fol. 146] state Commerce, but still if you must take all of the milk—

Judge Carswell: You could solve everything short of it.

Mr. McClain: It would not solve it, Your Honor. The Interstate Commerce question which we say is peculiarly—

Judge Carswell: I know, but it answers everything else except insofar as the U. S. Constitutional question is concerned?

Mr. McClain: Except insofar as Pensacola is involved. If he can answer that question, Your Honor, except as Pensacola is peculiar to the rest of the State.

Judge Jones: Well, if they have got the Interstate Commerce question before them there is nothing peculiar about Pensacola insofar as Interstate Commerce is concerned, is there?

[fol. 147] Mr. Harrell: Yes, sir, extremely peculiar, because of our geographical location, and because of the fact that we are so close; for example, we are closer to some Alabama producers than some of these Florida producers listed here. In other words, does the Constitution say this: Say that you have to buy milk eighty miles away in Florida at 61¢ in preference to milk that you can buy thirty miles away in Alabama for 40¢?

Judge DeVane: Well, if you will confine your case to that issue, it will be rather simple for the Court to dispose of it.

Mr. Harrell: We have this—I don't want to burden the Court, but maybe this will clarify for Judge Jones another direct attack that we have got on this Act, and that is as set forth in my pleadings in number 17 of the original complaint. And I have set it out in number 17, in which it said this, Judge, and I think it will clear up some of these questions:

"It is the intent of the legislature that the instant, when- [fol. 148] ever that may be, that the handling within the State by a milk dealer of milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this Chapter on the commission shall attach. After any milk so produced comes to rest within the State, any sale, within the State by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions is unlawful".

Judge Jones: Has that instant arrived? Has that instant been reached and passed?

Mr. McClain: It arises all the time, every day, it arises daily.

Mr. Horne: Neither of you contend that we have made an effort on anybody's license under that provision?.

Mr. McClain: Well, I don't know that you have made [fol. 149] any effort.

Mr. Horne: We never have, Your Honor,

Judge Jones: We are not deciding academic questions, and we are only to determine the constitutionality of this Act as it affects, the plaintiff is affected by it, as of the time that this case comes before us.

We can't conjecture what is going to happen next year or five years from now. We started out, and where we got with it, I don't know, to try to find out if there were fact issues and what they were. So far as I am concerned, I am just as far from it as I was when we walked in here at 9:30.

Now, I think we had better pretty quickly adjourn the town meeting and start the trial of this case. And if there are fact issues why maybe we can find out what they are as we go along.

Judge DeVane: Let me ask you this question and see if it will help to get somewhere.

[fol. 150] Mr. Harrell, what is the Commission doing today insofar as your company is concerned that you charge as being illegal?

Mr. Harrell: All right, they are forcing them to purchase, rather to pay John Adkinson, for example, a ratio of 8.784 percentage of all of Class 1 sales that are made insofar as his milk is produced. And also, to buy milk from these other producers here in accordance with this schedule, as set forth.

Judge DeVane: Now, let me ask you this question and clear that specific point up, forgetting those percentages that you have got there.

Do these producers anywhere meet your requirements of sales that you make of Class 1 milk?

Mr. Harrell: In the State of Florida?

Judge DeVane: In the State of Florida?

Mr. Harrell: Yes, sir.

[fol. 151] Judge DeVane: Do these producers produce all the milk, more milk than you need to meet your sales in the State of Florida? You have got in there that it is only 30%, that is why I ask that question.

Mr. Harrell: That is all classes, Your Honor. For example, we had a contract with Ft. Benning for over $1,000,000 a year.

Judge DeVane: I see. I have got that figure wrong. Do the Florida producers in the Pensacola area that you have relationship with, produce more Class 1 milk than your company can sell?

Mr. Harrell: Mr. Zirkelbach, he is President of Polar Ice Cream & Creamery Company, Your Honor, and he says that they do at times.

Judge DeVane: He says at times they do?

Mr. Harrell: Yes, sir.

[fol. 152] Judge DeVane: Let's take a little recess.

Mr. Harrell: Your Honor, of course, we can take testimony and adjourn the town meeting, but we will get into that a little later.

Judge Jones: The Court will be in recess for fifteen minutes, and hope that when we come back, perhaps we can have counsel better able to clarify in the minds of the Court as to what the factual questions are, and they can be stipulated.

We will be in recess for fifteen minutes.

(After recess, Court reconvened and the following proceedings were had:)

Mr. Harrell: We have one other witness besides Mr. Zirkelbach.

Judge DeVane: Do you want the rule invoked?

[fol. 153] Mr. Harrell: No, sir, we don't care for it, sir.

Judge DeVane: Do you want the rule invoked, Mr. Horne?

Mr. Horne: I don't insist on the rule, Your Honor.

Judge DeVane: How's that?

Mr. Horne: No, sir.

Judge DeVane: All right.

Mr. Lamb: Your Honor, please, there are a couple of motions that are before the Court at this time. Could we settle these before moving into this testimony?

Judge Jones: The motions will be carried in the case. I think that we are going right ahead now in the taking of testimony, and we will figure out if we can what the factual questions are as we go along. So you may proceed.

(Mr. J. F. Zirkelbach and Mr. T. C. Jacoby were sworn by the Clerk.)

[fol. 154] Mr. J. F. W. Zirkelbach was the first witness called, having previously been sworn, testified as follows:

Direct examination.

By Mr. Harrell:

Q. You are Mr. J. F. W. Zirkelbach, the President of the plaintiff, Polar Ice Cream & Creamery Company?

A. Yes, sir.

Q. Where is your plant located, Mr. Zirkelbach?

A. In Pensacola, Florida.

Q. And how far is it from your plant to the Alabama State line?

A. Sixteen miles.

Q. Would you please state for the benefit of the Court the general nature of your business insofar as it relates to the milk business, Mr. Zirkelbach?

A. Well, we buy raw milk, pasteurize and bottle it, and sell it in the State and without the State. We sell it to [fol. 155] consumers, dealers, and the United States Government within the State and without the State.

Q. Do you presently have any contracts with the United States Government for the supplying of milk and milk products needs at various military bases?

A. Yes sir.

Q. And what bases do you have, or have you had, contracts with at the time of this complaint? To save time I will ask you did you have a contract with Ft. Benning, Georgia?

A. Yes sir.

Q. I show you this contract and ask you whether or not this is the original contract that you had with Ft. Benning, Georgia?

A. Yes sir.

Q. And how much milk did you obligate your company to deliver?

Mr. Horne: Your Honor, I object. The contract is the best evidence.

[fol. 156] Mr. Harrell: All right, we would like to introduce it.

Judge DeVane: You offer it in evidence?

Mr. Harrell: Yes sir, as Plaintiff's Exhibit 1.

Judge Jones: Any objection?

Mr. Horne: No objection.

Judge Jones: Without objection it will be filed in evidence.

Filed in Evidence and Marked Plaintiff's Exhibit No. 1.

Mr. Harrell Continuing:

Q. I show you what appears to be a contract with Tyndall Field Air Force Base, is that a contract with your company at Tyndall Field?

[fol. 157] A. Yes sir.

Mr. Harrell: We would like to offer this in evidence as Plaintiff's Exhibit 2.

Judge Jones: Let it be received and filed in evidence.

Received and Filed in Evidence as Plaintiff's Exhibit No. 2.

Mr. Harrell Continuing:

Q. Did you also have a contract with the Navy Mine Laboratory at Panama City, Florida?

A. Yes sir.

Q. And have you had a contract with the Pensacola Naval Air Station for the delivery of milk to the Officers' Club and the Navy Exchange?

A. Yes sir.

Q. And the Navy Exchange there?

A. Yes, the Navy Exchange.

Q. Are you currently fulfilling these particular contracts?

A. Yes.

[fol. 158] Q. Have you totalled the amount of the contracts, Mr. Zirkelbach, as to the amount of the total of all these contracts that you have made with military installations?

Mr. Horne: Your Honor, I object to the witness testifying to the total of those contracts. It is stated in the contract and it is the best evidence.

Judge Jones: Oh, I think he may answer that, it is purely mathematical.

A. Well, it is approximately $2,000,000.

Mr. Harrell Continuing:

Q. The Ft. Benning contract, alone, was more than $1,000,000 wasn't it?

A. $1,760,000 something like that.

Q. And I believe these contracts are on a bid basis?

A. That's right.

Q. If you were to bid on the Ft. Benning contract, for example, now, and used any Florida milk to supply that [fol. 159] contract, how much would you have to pay, per gallon, for any Florida milk used?

A. 61¢ a gallon.

Q. And do you recall generally what your price for supplying milk at Ft. Benning was in accordance with this Ft. Benning contract?

A. I believe it was 58¢.

Q. So you have obligated yourself to supply milk at a cost delivered in Ft. Benning of 58¢ and if you used Florida milk you would have to pay 61¢ per gallon for every gallon used?

A. Yes.

Mr. Horne: Your Honor, I object on the basis of the immateriality of it. I thought that we had agreed, I was under the impression that we had agreed that the military involved in relation to price was like any other involvement was immaterial, and only whether the State of Florida attributes to the gallons involved the regulatory fee calculated on gallons was the only issue before the Court. I [fol. 160] don't think this is relevant to that point.

Mr. Harrell: We take the position it is an undue burden on Interstate Commerce. Also, it impairs his obligation on the contract. And I think clearly it would be material on that basis.

Judge Carswell: What about your stated position, Mr. Harrell, that this military milk was out of the question. I was rather impressed with what Mr. Horne had to say, I thought we were through with that.

Mr. Harrell: Well, the counter question insofar as this other order was concerned, Your Honor, but I think it is material insofar as the issues in this case, the over-all issue, as to whether or not it is an undue burden on Interstate Commerce—

Judge Cartwell: You are offering it for that sole purpose but not on the military aspect at all?

[fol. 161] Mr. Harrell: No sir. Now, it has been stipulated by Mr. Horne, earlier,—

Judge Jones: Let the Court rule. It was admitted for whatever value it has on establishing the basis on the question of compensation.

Mr. Harrell: We would now like to introduce the material relating to the exclusive jurisdiction of the military establishments which we have stapled all together and introduce as one exhibit.

Mr. Horne: Your Honor, I have no objection on the introduction of the documents, which consists of several letters from military legal officers, I do want to object to the legal conclusion that this constitutes exclusive Federal jurisdiction, but I have no objection to the admissibility of them with that comment.

[fol. 162] Judge Jones: With that comment they will be received and filed in evidence.

Received and Filed in Evidence as Plaintiff's Exhibit No. 3.

Mr. Harrell Continuing:

Q. Mr. Zirkelbach, about how many gallons of milk do you sell a year, generally, and can you relate it in dollars?

A. About fifty million gallons.

Reporter: Fifty million gallons?

Mr. Harrell: Fifty million gallons a year.

Mr. Harrell Continuing:

Q. And is all of this milk which you sell purchased within the State of Florida or is some of it purchased elsewhere?

A. Most of it is purchased outside of the State of Florida.

[fol. 163] Q. Where, generally, do you purchase milk, Mr. Zirkelbach?

A. Well, according to the seasons of the year where the supply is available, Alabama, Mississippi, Louisiana, Tennessee, Virginia, Illinois, Wisconsin, Minnesota, Missouri.

Q. Do you ever purchase any milk in Wisconsin for delivery within the State of Florida, for example?

A. We have several times.

Q. What is the price generally paid for out-of-state milk as compared with the price of milk purchased in the State of Florida?

A. Well, it is seasonal. At times of the year when you have bad weather in the south we have to go north to get milk and transportation would make it higher. Today's market is about $3.87 FOB Wisconsin. And we buy milk in Alabama today for $4.00 per hundred weight.

Q. $4.00 per hundred weight?

A. Yes sir.

[fol. 164] Q. Could you tell us how much that would be per gallon?

A. Well, $4.00 a hundred weight would be about 35¢ a gallon and $3.87 would be about 30¢ a gallon.

Q. And the price that you are now required to pay in Florida is how much per gallon?

A. 61¢.

Q. Now, do any Alabama distributors sell milk in Florida, Mr. Zirkelbach?

A. Yes sir.

Q. Do you have any statistics showing the number of gallons that these distributors sold for the month of November, 1961?

A. Barber Pure Milk Company, Montgomery, Alabama, sold 56,267 gallons.

Q. That was within the State of Florida?

A. That was within the Pensacola Milk Marketing area.

Judge DeVane:

Q. Was that retail?

[fol. 165] A. That was distributed to the military base at Eglin Field, 56,267 gallons. Now, Fairhope Ice & Cream-

ery Company distributed, both retail and wholesale, on the streets of Pensacola and in Escambia county, Florida, and Santa Rosa county, Florida, 8,721 gallons. Woodhaven Dairy at Robertsdale, distributed and sold 14,781 gallons in the Pensacola Milk Marketing area during the month of November, principally in Escambia county and some in Santa Rosa county. Benton's Dairy supplied 61,174 gallons of milk processed by Turner's Dairy in Anniston, Alabama, during the month of November. Borden's received 169,345 gallons of milk at the Pensacola plant from out-of-state producers. We purchased in November from Arkansas 251,810 gallons. I beg your pardon, that is Nashville, 251,810 pounds, excuse me. Blackbelt Dairy at Demopolis 290,900 pounds. And from Little Rock, Arkansas, 1,473,800 pounds of milk which equalled 234,478 gallons. Now, to meet competition of out-of-state distributors bid-
[fol. 166] ding on milk sold in Florida, this out-of-state milk was sold at less than the Milk Board price would require me to pay for it.

Mr. Harrell Continuing:

Q. Mr. Zirkelbach, would it be a fair statement to say that you are in a peculiar position geographically in Pensacola in which you have to compete directly with Alabama plants which sell on the streets of Pensacola, who can buy milk for distribution on the streets of Pensacola for 40¢ per gallon, and you have to pay 61¢ a gallon, is that correct?

A. That is right.

Q. Can you buy milk in Alabama, yourself, for 40¢ a gallon?

A. I can buy it for 35¢ a gallon today.

Q. How long have you been in the milk business?

A. About twenty-three years.

Q. And it would be a fair statement to say that your company is one of the largest independent milk dealers in the south, is that correct?

[fol. 167] A. Yes sir, I am.

Q. Do you know of any place in the United States that has a price as high as 61¢ per gallon, other that Florida?

A. To my knowledge and from the records and statistics furnished by the Department of Agriculture, 61¢ is the highest price in existence.

Q. Is there a surplus of milk, Mr. Zirkelbach, or is milk in scarce supply?

A. Milk is in tremendous surplus.

Q. If every one of the Florida producers were to go out of the milk business, would you be able to supply the needs of the citizens of the State of Florida from sources?

A. Citizens of my area wouldn't know anything happened, they would not miss the milkman, he would be there on time.

Q. Mr. Zirkelbach, the Court in the earlier discussions mentioned whether or not the Florida milk producers pro- [fol. 168] duced more than enough milk to supply your Class 1 needs, would you please testify with respect to this particular area?

A. Well, there are times when they do and times when they don't. It is seasonable. Their production varies. One man is supposed to produce 100 gallons of milk a day, well first thing you know he will be producing 50 gallons a day and then before you know he will be producing 120 gallons a day. We have to have outside sources to protect our business.

Q. What generally are the classifications for which milk is used without going into to much detail, so that the Court can have a better understanding of this?

A. Well, milk sold for food purposes is supposed to be Class 1. And then you have other manufacture classes. If you use it for cottage cheese it is another class. If you use it in buttermilk it is another class. And if you make [fol. 169] ice cream it is another class. All is the same milk, the same quality. The only difference is the Milk Commission has established a ratio of prices depending on what you use it for. If you go to a store and buy a suit of clothes and you use it for Sunday, it is worth more than if you use it on Monday. That's the way the price structure is set up. It has no bearing on the quality of the milk.

Q. Mr. Zirkelbach, if you were to buy milk in Wisconsin and bring it within the State of Florida for sale, before you could sell it in the State of Florida, are there any regula-

tions now in effect with respect to tests for wholesomeness or any requirement insofar as healthful aspects of the milk are concerned?

Mr. Horne: I object, Your Honor. I am interested in expediting the trial as Your Honor has indicated, but I object to the continued leading questions to this witness.

[fol. 170] Mr. Harrell Continuing:

Q. Well, to save the Court's time, I will ask you who has charge of the inspection of milk?

A. Florida Department of Agriculture and the State Board of Health, jointly.

Q. There is nothing in this Milk Commission Act, which is 501 Florida Statutes, which has anything touching the inspection of your wholesomeness, is it?

A. No sir.

Q. Getting back to that question, and I would like to leave that, but if you purchased milk from Wisconsin does it have to pass any inspection before you can sell it in Florida?

A. Yes sir.

Q. And who makes that?

A. The Florida Department of Agriculture is authorized and inspects the plant and the State Board of Health takes a sample and determines that the quality of the milk comes [fol. 171] up to their standards before we can unload the truck.

Q. Is it possible for you to buy Wisconsin milk delivered in Florida that will meet the Florida Health regulations and specifications?

A. Yes sir.

Q. Is it your understanding, Mr. Zirkelbach, that you are required by the orders of the Milk Commission to take all of the milk produced by your Florida milk producers as listed on Exhibit 1, which are in the pleadings?

Mr. Horne: I object, Your Honor, unless the Court wants to take this continued leading questions. I don't want to be presumptuous to the Court.

Judge DeVane: Is it only on the basis that it is leading that you object?

Mr. Horne: That and his conclusion of law also.

[fol. 172] Judge Jones: On either ground the objection is good. It will be sustained.

Mr. Harrell Continuing:

Q. Can you bid competitively, Mr. Zirkelbach, for delivery of milk to military bases having to pay 61¢ per gallon for that milk?

A. No sir.

Mr. Horne: I object, Your Honor.

Judge Jones: I thought that issue was gone.

Mr. Harrell: That one issue still remains, Your Honor, which I stated in answer to Judge Carswell. In other words, the undue burden on Interstate Commerce, the issue of price if he has to pay 61¢ and Alabama producers they can buy their milk at 40¢, that certainly is a critically firm issue.

[fol. 173] Judge Jones: It has been conceded hasn't it that the prices paid for milk furnish to military installations that the place where it is bought is not involved in this case? Do you concede that Mr. Horne?

Mr. Horne: Yes sir, he can pay 10¢.

Mr. Harrell: Well, let me ask him this—I hate to be dense.

Judge Jones: The objection is sustained to the question as you asked it.

Mr. Harrell Continuing:

To expedite it, Your Honor, if we could agree if he bought Florida milk to deliver to military bases that he would have to pay 61¢, I believe that is correct. Is that correct?

Mr. Horne: I am sorry, I didn't understand you.

[fol. 174] Mr. Harrell: If he delivers Florida milk to a military base, he will have to pay 61¢ per gallon for each gallon of Florida milk so delivered?

Mr. Horne: There is no military utilization in that area at all. The producers voted it out and it is not involved at all.

Mr. Harrell: Well, we will call Mr. Fisher and ask him that question to save time, Your Honor.

Mr. Harrell Continuing:

Q. Now, you have alleged in your complaint that 70% of the milk used by your plant is purchased from without the State of Florida?

A. That's right.

Q. Is that only Class 1 sales, or does that include all sales?

A. All sales, no classes involved.

[fol. 175] Mr. Harrell: You may examine.

Cross examination.

By Mr. Horne:

Q. Mr. Zirkelbach, I believe you testified that you were buying milk in Alabama for 34½¢ a gallon, is that correct?

A. Yes sir, $4.00 a hundred weight.

Q. Are you utilizing—what is the utilization of the milk you purchase in Alabama for 34½¢ a gallon?

A. I don't keep no utilization. Milk is just like sardines to me. I buy a gallon of milk and I sell some of it in the bottle, some of it in the can, some of it they make ice cream out of it, and some of it cottage cheese. I never have kept any utilization records.

Q. Do you agree with me that Alabama requires the payment to its producers 56¢ per gallon for milk used in Class 1 utilization?

A. That don't make no difference to me. I don't classify the milk up to now.

[fol. 176] Q. You don't classify it?

A. No sir.

Q. Even for your Florida sales you don't classify it?

A. No sir. To make the record clear before the Milk Commission entered the picture we had what we called agreements to buy so much milk at such and such a price from our producers. We bought that milk regardless of what we used it for, whether we put it in ice cream, in

the bottles, or anything else. It was just like if you go to the store and buy a pound of cheese, you can eat it sliced, or you can eat grated, or you can put it on macaroni and do whatever you want to do about it. That has been my business and what I run it now.

Q. I want you to answer my question, what I am asking you. If your attorney wants to put you back on redirect, he can and I think the Court will agree with me on that. Did you testify that the Alabama distributors, Alabama [fol. 177] distributors; sold milk to Pensacola and paid less than the Florida Class 1 price for it?

A. Yes sir, they are doing it now.

Q. To your knowledge?

A. Yes sir.

Q. Would you believe me if the records which they give to the State of Florida indicate that when Alabama distributors sell milk in Class 1 channels in Florida that they pay their own producers the Florida producer's price? Would they be giving erroneous information under those circumstances?

A. Well, all I know is that they told me last week that you requested them to do it and that they would not do it and they would cut the Florida producers off before they did do it.

Q. No, I am talking about the Alabama producers. You testified that they were selling milk in competition with you on the streets of Pensacola and that they got it at a [fol. 178] greatly depressed price. First of all I want to ask you is they reduced Class 1 price in Alabama to 56¢ per gallon instead of 34½¢ per gallon as you testified to?

A. Well, the milk that is sold in Florida is exempt from the Alabama Milk Control regulations. They put surplus milk on the Florida market. They didn't buy it—

Q. Do you know this of your own knowledge, Mr. Zirkelbach?

A. I am going by what the man, the manager, told me.

Q. You testify, Mr. Zirkelbach, to what you know. Confine it to what you know, that is what I am trying to get to. Do you know this of your own knowledge that you have testified to?

A. Only what I have been told. I didn't see the records.

Q. Have you bought such milk and sold it in Pensacola and you know that of your own knowledge or not?

A. Only what they have told me, that's all.

[fol. 179] Judge Jones: The court reporter may be having a little difficulty in hearing you when you let your voice drop down. If you can keep it so she can hear you she would appreciate it.

A. Excuse me.

Mr. Horne Continuing:

Now, Your Honor, I have an area of cross-examination here that I would like to proffer to the Court before I go into it to determine whether or not you consider it relevant at this stage in the case or not, concerning the relationship of this distributor to his producers with respect to threats, slashing of prices, and that sort of thing with them. In all good faith I want to proffer that, first, before I go into it.

Judge Jones: What is the materiality of it?

Mr. Horne: Only in justifying the necessity of regula-[fol. 180] tion of relationship, base relationship, between the distributor and the producer. It is part of the statute that's under attack. I know that it does not go directly to the question of constitutionality or not.

Mr. Harrell: We would like to object as being wholly irrelevant and immaterial in this particular hearing.

Judge Jones: The Court has some doubt as to the admissibility of it but has concluded to receive it subject to the objection and to later exclude it if we feel that it tenders issues that are not material.

Mr. Horne Continuing:

Q. Mr. Zirkelbach, prior to the assumption of jurisdiction and control by the Florida Milk Commission, did you have a relationship with the producers listed in the exhibit that comes in under your part of the case, in other words, your producers?

[fol. 181] A. Yes sir.

Q. Now, will you tell the Court under that relationship, without any State control at all, what you were paying your producers for Class 1 milk?

A. We had no Class 1 milk. I just got through telling you that.

Q. Mr. Zirkelbach, are you telling this Court that you didn't sell any milk to residences and stores?

A. We sold milk to residences and stores and manufactured with it, but we had no classes. We didn't classify milk.

Q. Didn't you pay your producers different prices dependent upon your utilization?

A. No sir. We had no utilization at all. We had an agreement to buy so many gallons of milk from Jim Jones and John Smith at so much a gallon.

Q. How much was it?

A. Over 61¢. That had no relation to what I used the milk for.

Q. All right, you paid 61¢ a gallon?

[fol. 182] A. For an agreed amount of milk. Over that was $4.00 a hundred weight.

Q. A number of gallons of milk?

A. That's right.

Q. With the producers that the Florida Milk Commission subsequently told you would be your base producers, is that right?

A. Yes, but you put me on a classification basis.

Q. You answer my questions, Mr. Zirkelbach. We did not add any new producers to you did we?

A. No sir.

Q. All right, now then, did you write your producers prior to the election of the Florida law and tell them they had better not vote in the Florida Milk Commission?

A. I wrote them and told them—

Mr. Harrell: I object to that.

Judge Jones: What is the purpose now, Mr. Horne?

[fol. 183] Mr. Horne: The same proffer, Your Honor, to show the relationship between this man and his producers surrounding the assumption of a legal control under a Florida statute.

Judge DeVane: You can ask him if he objected to it, to the assumption of that legal control.

Mr. Harrell: Your Honor, for the record, we would like to renew our objection on the ground that all of this material that he is going into is not proper cross-examination.

Mr. Horne: It was my understanding when he objected one time that all of this would run with that objection, subject to your subsequent decision.

Mr. Horne Continuing:

Q. Mr. Zirkelbach, I will get right down to the point then— On November 22nd, 1961 the Florida Milk Commission was voted in, isn't that a fact?

[fol. 184] A. So you say, yes.

Q. Did you subsequently to that time inform your producers that you were cutting the price you had been paying them from 61¢ to 56¢ a gallon?

A. Right.

Q. Did you also tell them that you were going to pay that retroactive to almost a month earlier?

A. There had been no settlement for November, that would be the November price.

Q. As a matter of fact in calculating their entitlement for November on notice given November 22nd or 23rd, did you not pay them on a reduced price?

A. That's right.

Q. Now then, on the following month, December, Mr. Zirkelbach, did you slash that price further from your course of business dealings that you had been involved in without any control, to some gallonage figure in the thirties or forties?

A. $5.00 per hundred weight.

[fol. 185] Q. What is that per gallon?

A. 43¢.

Q. 43¢ a gallon?

A. That's right.

Q. From the 61¢ which you had been paying?

A. Yes, but that by the way was for all milk, not only the agreed amount but all they sent me.

Mr. McClain: If your Honor please, I make another objection on the ground that there is no relation to this examination with that inquired about in chief. I under-

stand that cross-examination is not to go beyond that inquired about on direct.

Judge Jones: Well, I think it has gone rather far afield and Mr. Horne has indicated he is through and we will consider that objection in connection with the others.

Mr. Horne Continuing:

Q. Mr. Zirkelbach, to that point of your testimony on [fol. 186] chief—

A. On what?

Q. On the direct examination by your lawyers, where you testified that sometimes your producers produced more milk than you utilized in Class 1 sales. Would you bring this a little bit more specific as to that point—when is "sometimes"? During what parts of the year?

A. Well, there are days when I pick up the milk and I don't sell any of the Class 1.

Q. How many days, approximately, would that be during the year that you don't have any Class 1 sales?

A. Well, holidays, when we don't work. We pick up milk whether we sell it or not.

Q. Well now, Mr. Zirkelbach, I understand that you don't deliver every day. Now, are you telling me that you don't have any Class 1 sales on some days when you have deliveries?

A. We are getting a little bit confused you are trying [fol. 187] to tell me about Class 1 and I am telling that there have been no classes. Milk is milk to me up to now.

Q. Mr. Zirkelbach, you have classifications of milk, now, because you are under the jurisdiction and control of the Florida Milk Commission, if there is one; now, are you telling this Court you don't have some Class 1 sales on some periods of time?

A. I don't classify the milk.

Judge DeVane: Now, that is not answering his question. Don't you sell to the consumers?

A. Yes sir.

Judge DeVane: Don't you know what he means by Class 1 classifications?

A. I don't keep classifications.

Judge DeVane: That doesn't make any difference. His question goes to how much milk in their classification of [fol. 188] Class 1 do you sell weekly or monthly, in the bottles?

A. I am sorry I don't have any records, I don't keep any records abstract from the sales according to classification. I bring the milk in and dump it in the tanks and use it for whatever I have requirements to use it. They are attempting to classify the milk and if the Milk Commission says to I will go along with them, but up to now I haven't kept any records classifying the milk.

Mr. Horne Continuing:

Q. Mr. Zirkelbach, do you keep monthly records of your sales?

A. Only in dollars and cents.

Q. Not whether it goes to the military or not?

A. No sir.

Q. You don't keep the reports right now that are required by the Florida Milk Commission?

A. No sir, I haven't yet.

[fol. 189] Q. Have you kept any monthly producer receipts, producer pay records?

A. Yes sir.

Q. But you have kept no sales records at all during the time the Milk Commission has been in existence?

A. No sir. I would have to put in two or three clerks that we don't have to do that work.

Judge Carswell: Let me ask you a question here, Mr. Horne. From the record here the hearing that was originally set for sometime within the next day or two was put off until the 21st, was that what that was about, a rule to Show Cause why he wasn't keeping these records?

Mr. Horne: Yes sir.

Judge Carswell: Was this the kind of record that that hearing was about?

[fol. 190] Mr. Horne: Yes sir. He refused to let us look at any books.

Mr. Horne Continuing:

Q. Now, Mr. Zirkelbach, I am getting back to your testimony now, where you told this Court that sometimes your producers produced more than your Class 1 sales. I am trying to get you to define when that "sometimes" is. Now, would you tell whether it is one month, or two months, or ten months out of any given year your producers supply you with more milk than you sell—I am not going to use Class 1 because you are going to tell me that again—more than you sell to stores and household customers?

A. Well, they produce more milk all of the time than I sell to the stores and houses under your jurisdiction.

Q. Under my jurisdiction?

A. That's right.

Q. Tell me what you are talking about there?

[fol. 191] A. I am talking about excluding military sales, sales on reservations, excluding school milk sales, strictly sales of milk to the consumers and dealers, they produce more than 50% of my requirements, estimated.

Q. Did you tell Mr. Fisher the last time you were here that your producers can't furnish your Class 1 needs?

A. No sir, I did not.

Q. It is your testimony that you did not say that?

A. I did not say that. I said this: he asked me the question, do I use any outside milk on my orders and I said, sometimes I do, at times I do.

Q. You didn't make the statement to him, Mr. Fisher, in his office here in Tallahassee, on the occasion of the last hearing before Judge Carswell, that your Florida producers could not satisfy your Class 1 needs?

[fol. 192] A. No sir, I did not make that statement. He did not ask me that statement.

Q. Now, I want you to define—would you make an estimate, could you tell me on this "sometimes" business, do they fail to produce your Class 1 needs most of the time?

A. I just got through telling you that they fail to produce the milk that I—no—at all times they produce more more milk than I sell on the streets of Pensacola under your jurisdiction, exclusive of sales to the military, sales on the reservations, and take school milk out, they give me more milk than I need.

Q. We were talking about Class 1 sales?

A. Now, I am trying to tell you that I have no classes. You keep talking classes. I am talking gallons of milk.

Q. Are you telling this Court that you don't know what I am talking about when I say Class 1 sales?

A. I understand it but I haven't kept the records that way. I haven't seen the need of them up to now.

[fol. 193] Q. Then how do you know whether your producers furnish you more or less than your Class 1 needs?

A. I am just telling you, I estimated it.

Q. Oh, I didn't know that. Then you don't know, do you?

A. Well, I can pretty well tell by estimation what I do. If I have no money in the bank I ain't doing no business.

Q. Were you estimating the other day with Mr. Fisher when you were talking to him about this proposition?

A. There are times when I don't have enough milk to go around on the local trade. He asked did I ever use any outside milk and I said, yes, everybody does at times. You can't control the supply and sales and keep them in balance.

Q. I want to go now to a definition what your plant is [fol. 194] insofar as milk from other states is concerned. Isn't it a fact that when you buy milk from distress areas that you related to the court and bring it across the state line and put it in your plant, that at that point it is raw milk produced, is that correct?

A. Well, it is raw milk. It is not at all times from producers it may be from some other distributor.

Q. All right. At that point, could it be sold on the streets of Florida or any state in which you do business without doing anything to it?

A. Yes; outside the city limits it can be sold as raw milk.

Q. In your area of sales could it be sold?

A. Yes, if raw milk is sold in my area you don't have to process it outside the city.

Q. Escambia county doesn't have a code on pasteurized milk?

A. It doesn't have any code.

Q. What do you do with the milk, keep selling raw milk?

[fol. 195] A. No sir.

Q. Just tell me what you do, tell the Court what you do with the milk from the time you get it?

A. Well, we process it in the form of pasteurized, we make cottage cheese, we make buttermilk, we make chocolate milk, we make ice cream.

Q. Before you sell it, the milk, to any place that you sell milk, I am talking about all of your sales, whether it is military installation, whether it is school milk, no matter what it is, before you sell this milk you send it through a process of homogenization or pasteurization, is that correct?

A. Both.

Q. Both?

A. Yes.

Q. Now, is that a rather expensive and involved procedure?

[fol. 196] A. What do you mean expensive?

Q. Is homogenization and pasteurization an expensive process?

A. Well, you have got to know what you are doing to do it. I don't know about the expense involved in it but you have got to do it.

Q. Does it take expensive equipment?

Judge DeVane: We know that.

Mr. Horne Continuing:

Q. What else do you do to it?

A. This thing is getting on the border of ridiculous.

Q. The point I am going to here is the packaging theory, the broken package theory, I am trying to show that there is a metamorphosis here from the time he gets it into his plant, a metamorphosis from a product that is unsalable for the most part into one that is salable.

Judge Jones: And he answered it when he says that [fol. 197] everything that he buys is processed before it is resold?

Mr. Horne: Yes sir, I was trying to carry it through the entire packaging doctrine which I think requires that he do something further to it. If the Court is satisfied

with that point I will leave it. That was part of it though that if this thing comes into Florida it is done something with that constitutes a breaking of the package, or change of identity, that imminates in Florida, as a matter of fact.

Mr. Horne Continning:

Q. Was it your testimony that you distribute fifty million gallons a year?

A. That's right.

Q. Isn't it a fact that your own Florida producers only produce 1,240,000 some odd gallons a year?

A. Well, you must remember I handle milk interstate and milk goes back in the state.

[fol. 198] Q. I am just asking you a question, you distribute fifty million gallons?

A. I estimated fifty million, if I have it wrong, let me see, thirty—no, that ought to have been five million, I had my decimals wrong in my mind. I don't have any certificate here, I am just trying to figure in my mind.

Q. Your testimony is that you distribute five million gallons a year?

A. That is about right, yes sir. I got one too many oughts in my mind.

Mr. Horne: That's all.

Redirect examination by Mr. Harrell:

Q. Mr. Zirkelbach—

A. I am glad to correct that, fifty million gallons is a lot of business.

Q. —you have a substantial investment in your plant in Pensacola, do you not?

A. Yes sir.

Q. Could you give me an estimate of how much you have invested in your entire plant?

[fol. 199] A. Well, in the plant itself about $250,000. About $450,000 in trucks and delivery and pick-up equipment, $350,000 in accounts receivable, $125,000 merchandise and supplies, and cash to do business with, working capital, approximately $200,000.

Q. Mr. Zirkelbach, since the Pensacola area has come under the jurisdiction of the Milk Commission, has there been a tax levied with respect to milk sold by you by the State of Florida?

A. I didn't get the question.

Q. In other words, since you have come under the jurisdiction of the Milk Commission, is there a tax on the milk under the law to be paid by you?

A. Oh, tax.

Q. Yes sir.

A. Yes sir, 15¢ on a hundred gallons.

Q. And have you been advised that this also is to be collected by the State on milk delivered by you on military reservations?

[fol. 200] A. Yes sir.

Mr. Harrell: I believe that is all. Step down Mr. Zirkelbach.

Mr. McClain: Your Honor, I would like to call Mr. E. V. Fisher, as an adverse witness, and have him sworn. He is Administrator of the Florida Milk Commission.

Mr. E. V. Fisher, called as an adverse witness by the plaintiff, after first being duly sworn by the clerk, testified as follows:

Direct examination by Mr. McClain:

Q. State your name and address?

A. E. V. Fisher, 1314 Betton Road, Tallahassee, Florida.

Q. Do you have any connection with the Florida Milk Commission?

A. Yes, as Administrator.

[fol. 201] Q. How long have you served in that position?

A. Since July 1, 1961.

Q. Are you familiar with the time that the so-called Pensacola milk marketing area came under the supervision of the Florida Milk Commission?

A. I am.

Q. Can you give the date?

A. November 22nd, 1961.

Q. Mr. Fisher, what obligation does the Polar Company have with respect to its receipts and acceptance of any or all milk tendered to it by the Florida producers in the Pensacola milk marketing area?

A. I think perhaps you should limit that question to only the producers, base producers, of the Polar Ice Cream & Creamery Company.

Q. Okay, assuming they have relationship with the Polar Company, what amount of milk must the Polar Company accept from them if they tender it?

[fol. 202] A. That which is produced by their base producers.

Q. Others?

A. That is restricted under our surplus Order No. 20-17.

Q. Restricted in what way, Mr. Fisher?

A. If those producers over a period of twelve consecutive months deliver in excess of 115% of their base production, or for a period of ninety consecutive days in excess of 110%, then, they can notify the Commission, we can have a hearing, and cut back to what we think is reasonable and just on those producers.

Q. Have you ever known the Commission to give any sort of relief under Order 30-17?

A. Yes, when properly presented we have.

Q. When did you ever do that?

A. We are in the process of it at this time.

Q. It has not been done?

A. We haven't had any requests lately.

[fol. 203] Q. This is futuristic you are talking about?

A. No, I would say that we are now in the process, because that is being done at this time. Letters have gone out.

Q. Are you not familiar with the fact that many requests have been made by the distributors in the past and that no relief was given?

A. I understand that that has been.

Q. That is a true statement?

A. I feel that it is.

Q. Is it not correct, Mr. Fisher, that if the Polar Company refused to accept any gallon of milk tendered by the

base producers in the Pensacola Milk Marketing area that it would be in violation of your order and law?

A. Yes, because we have not had proper notification.

Q. And in order to do that they would have to assign reasonable cause and give reasonable advance notice and come before your Honorable Body and prove reasonable [fol. 204] cause and reasonable advance notice?

A. I think they would have to prove that they had received milk in excess of 115%.

Q. Then it is true that if tomorrow the Polar Company should reject ten gallons of milk offered by any Florida producer that has this relationship with the plant that it would be grounds for suspension or revocation of his license?

A. I think that you are making a very drastic statement. Without proper hearing, no.

Q. It would be a basis for a Show Cause Order, would it not?

A. I think it could be.

Q. You know that it could be done?

Judge DeVane: It ought to be done if you are going to act. A Show Cause Order is to find out the facts, isn't it?

[fol. 205] Mr. McClain: Your Honor, I was just attempting to establish that there is an obligation under the law and under the order for the distributors for the Polar Company to take all milk tendered by the Florida producers in the Pensacola area having this so-called base relationship and I just wanted a yes or no answer to that question.

Judge Jones: Or to submit some reason to the Commission as to why they should be released of such obligation?

Mr. McClain: That is correct.

A. Yes sir.

Mr. McClain Continuing:

Q. Now, Mr. Fisher, at the end of each month, I believe that is correct and correct me if I am wrong; the Polar Company and all other distributors are required to account

to the producers how the milk that has been received from [fol. 206] those producers has been utilized; that is, sold in fresh food form, etc., and also to the Commission, is that correct, sir?

A. That's right, on I-16.

Q. On what, sir?

A. On I-16, which is a report.

Q. That is a form of report?

A. Yes.

Q. Now, in the Pensacola milk marketing area with respect to Exhibit L of the plaintiff's complaint, with the percentage figures shown there, if the Polar Company reported so many Class 1 sales; that is, sales of fresh fluid milk, the Florida Milk Commission would require the Polar Company to pay to the Pensacola producers that have this so-called relationship the percentage shown opposite each producer's name of the Class 1 sales, is that correct?

A. As a contractual relationship between the distributor and the producer we would require that.

[fol. 207] Q. And no Alabama producer would have that protection, would it?

A. Not necessarily.

Q. The Florida producer then would come first with respect to getting it so far as your order is concerned, with getting this percentage of the Class 1 sales, as a first cut?

A. In the base relationship, that is right.

Q. And would be preferred over any other producer who may have delivered milk to that plant from Alabama, Mississippi, or what have you?

A. I would say, yes, because that is a contractual relationship between Polar Ice Cream & Creamery and their producers.

Q. What do you mean by "contractual relationship"?

A. That is a contract whereby they have received or accepted milk over a period of time, and it is usually set up on a, during a base period which is September, October [fol. 208] and November in the Pensacola area, and that is when your bases were open, however, they are now frozen, and we have taken those bases that were established by a previous course of dealing.

Q. You mean to tell me that the Commission hasn't ordered the Polar Company to pay these percentages?

A. Will you repeat that question?

Q. Do you mean to tell me that the Polar Company is not under Commission order to pay these percentages and this is something of a voluntary contractual relationship?

A. It is a contractual relationship. We have audited those figures and prepared those bases.

Q. You have ordered them to pay those percentages, have you not?

A. Right.

Q. And if they don't pay them what do you do?

A. Well, I can imagine we will have a Show Cause [fol. 209] Order.

Q. You will cite them with a Show Cause Order as to why their license shouldn't be suspended or revoked if they don't pay these percentages as set forth in this letter, is that not correct?

A. I don't believe that they are contesting those percentages.

Q. I am asking you a question and I want an answer. If they don't pay these percentages would you not cite them to Show Cause?

A. Yes, I think we would.

Q. Do you know the Alabama prices?

A. Yes sir.

Q. What are they?

A. It is 56.56 per gallon 4% milk at this time.

Q. Class 1?

A. That is Class 1, yes.

Q. Now, Mr. Fisher, suppose the Polar Ice Cream Company should sell 100,000 gallons of milk under a bid to [fol. 210] a military installation, such as Eglin Field or Ft. Benning, Georgia, would that milk be classified under your classification system as Class 1?

A. No sir, that would be military milk.

Q. Excuse me, do you have any special classification except for Polar's producers for military milk? Today, I am talking about today, in the Pensacola milk marketing area?

A. If they used producer milk that would be Class 1, yes, at 61¢ a gallon.

Q. And you would require the Polar Company then to account to the producers for that milk sold to Ft. Benning camp just as Class 1 milk and you would take that percentage up to these people named and you would count that in your auditing computation?

A. It takes the Classification of Class 1 milk, it is for human consumption, and we would take that in if they used their producers milk.

[fol. 211] Q. It would be 61¢ a gallon?

A. Yes, and they know that when they use it.

Q. We all know it, don't we? We all know it?

A. You do.

Q. Now, do you impose a tax of any kind upon this milk that is bid and sold to military installations?

A. That's a regulatory fee.

Mr. Horne: Your Honor, the statute is the best evidence of what this is and what it is and when it is charged, and when it isn't charged.

Mr. McClain: Well, they try to talk about statutes one time, then they have got to talk about the audit—

Judge DeVane: Everybody conceded the milk Commission is insistent they pay a tax on all milk produced, whether it is sold to a military installation or otherwise.

Mr. McClain: I don't know sir.

[fol. 212] Judge DeVane: That is not an issue before the Court.

Mr. McClain: I understood in this case—

Judge DeVane: The question as to whether or not they have got a right to it.

Mr. McClain: Pardon me, Your Honor, if I am duplicating I will stop. I just wanted to get him to say yes or no if this tax was applicable.

Judge DeVane: They are attempting to enforce the tax.

Mr. McClain: That's understood.

Judge DeVane: And you are attempting to get away from it, there is not any question about that.

[fol. 213] Mr. McClain: Now, Mr. Fisher, are you aware of the fact that the Alabama distributors do sell in the Pensacola marketing area in competition with the Polar Company?

A. Yes sir.

Q. Are you aware of the fact that the Alabama producers, the distributors can buy milk at cheaper prices?

A. Yes sir.

Q. At the present time are you not trying as the Commission to work out some sort of an arrangement with the Alabama Milk Control Board in which to try to solve the Pensacola problem?

A. We have tentatively set up a date.

Judge Jones: What has that got to do with this case?

Mr. McClain: It only shows, Your Honor, the fact that there is an Interstate Commerce question.

[fol. 214] Judge Jones: We know that there is an Interstate Commerce question.

Mr. McClain: All right. I withdraw the question.

Judge Jones: You are taking up a lot of the Court's time in arguing with this witness about things are either admitted or outside the case. I don't want to cut you off.

Mr. McClain: I am about through, Your Honor. I might as well stop now.

Judge Jones: While you have this witness it would be helpful to me if you would clear up this question concerning contractual relationship.

Mr. Horne: All right, sir.

Examination by Mr. Horne:

Q. Mr. Fisher, you testified that if the Polar took its [fol. 215] base earned producers milk and utilized it on military installations that you would consider that as a Class 1 utilization and charge 61¢?

A. Yes sir.

Q. Since conjecture is in the question, do you require or attempt to require or urge the utilization of its producers in military utilization?

A. No.

Q. Now, Mr. Fisher, you testified that you considered this base relationship between a distributor and its pro-

ducers to the contractual relationship based upon a previous course of business dealings, would you amplify that insofar as the position of the Florida Milk Commission is concerned?

A. Well, it is the position of the Milk Commission there that they are more or less a referee in seeing the contractual relationships are lived up to by both parties.

[fol. 216] Q. You mean then, Mr. Fisher, that the State has by this statute created the relationship between them and defined the rules under which it shall be supervised and then calls this base a property right, is that correct?

A. I think so, yes.

Q. You didn't intend to suggest to the Court that there is a separate written instrument voluntarily entered into between the distributor and the producer?

A. No sir.

Judge Carswell: May I interrupt a minute?

Mr. Horne: Yes sir.

Judge Carswell: Mr. Fisher, this arrangement for lack of a better word, not a contract, I believe you referred to a course of dealings. Under the Statute, as I understand [fol. 217] it, the Commission was authorized to take the previous course of their dealings, and you have a base period of three or four months, I believe you said in the fall in Pensacola, and taking that basis under the authority of the statute and made what you referred to as a contract, is that what you mean?

A. We did not make the contract.

Judge Carswell: I understand but that is what you were calling the contract, the relationship between these parties?

A. Yes, base relationship.

Judge Carswell: And it was frozen in that situation and that is where it stands?

A. Yes sir.

Mr. Horne: I have no further questions.

Mr. McClain: May I ask one further question.

Mr. Horne: Yes sir.

[fol. 218] Examination by Mr. McClain:

Q. Prior to November 11, 1962, how long was the Pensacola area and the producers involved therein out from under the control of the Milk Commission, do you recall, sir?

A. You said November 11, 1962.

Q. 1961?

A. You mean November 22nd, 1961?

Q. That is correct.

A. Some period in there, I believe, about three or four years.

Q. Actually, what was the last base fixing period in which they had some sort of a test run in the Pensacola area?

A. I don't have that record.

Q. Would it be some four years ago?

A. I would say, yes.

Mr. Horne: Step down, Mr. Fisher. We have one other witness.

Judge Jones: How long will it take?

[fol. 219] Mr. Harrell: Not too long.

Judge Jones: Proceed then.

Mr. Theodore C. Jacoby was next witness called, having previously been sworn, testified as follows:

Direct examination.

By Mr. Harrell:

Q. Will you state your name, please?

A. Theodore C. Jacoby.

Q. Where do you live Mr. Jacoby?

A. St. Louis, Missouri.

Q. What is your business?

A. I am a Milk Commission Merchant.

Q. How long have you been in the milk business?

A. Fifteen years.

Q. Would you state, generally, what your function is in your business insofar as the sale of milk is concerned?

[fol. 220] A. We are considered prime suppliers of fluid milk, dealing in long and short positions, surplus milk,

movement of milk between States, a seller wants to sell milk we go to work and sell it for him, a buyer wants to buy milk we go to work and find a source of supply. In other words, you might consider that we deal in availability of milk supplies and because of our constant dealing among these supply connections and buyers, why, we are familiar with the prices involved in putting together those transactions.

Q. Can you give us some idea of how many gallons of milk your firm handles per day or per week?

A. Today in surplus milk we deal in about 500,000 pounds. That would be considered about eighteen tank trucks, 36,000 pound tank size, moving daily. We are talking now about approximately eighteen tank trucks moving daily some place.

Q. About how many gallons per day would that be?

[fol. 221] A. Oh, divide by six, 40,000 gallons, 30,000 gallons.

Q. Is it your business to know the selling price in the markets all over the United States?

A. Yes sir, because of our contacts.

Q. And could you state what the Class 1 price in Pensacola is with relation to prices elsewhere in the markets of the United States?

A. I have generally considered those prices higher than any part of the country.

Q. Could you give some comparable prices, such as Chicago, Milwaukee, do you have any comparable prices?

A. Yes, well—

Mr. Horne: If the Court please, could I ask the witness whether these are surplus prices, or prices under regulatory boards?

[fol. 222] Judge DeVane: He will have to give number 1 Class in all other places to make any comparison, he would have to.

Mr. Horne: Then his testimony—

Judge Jones: You will have him on cross Mr. Horne.

Mr. Horne: All right, sir.

Mr. Harrell Continuing:

Q. In short, is there a scarcity of milk now, Mr. Jacoby, or is there a surplus?

A. No, there is a surplus condition throughout the whole United States.

Q. How long has this surplus condition existed with respect to milk throughout the United States?

A. I would say around the past ten years.

[fol. 223] Q. Is it improving now or getting worse?

A. The last government figures was 2%, 1961 was 2% over 1960.

Q. Do you have statistics compiled by the Department of Agriculture setting up these figures?

A. Yes sir. This brochure here is Milk Production and Dairy Products, Annual Statistical Summary, 1961, by the United States Department of Agriculture.

Q. Do you have in that manual ready available statistics with respect to the amount of surplus milk?

A. Well, in milk production the United States totalled one hundred twenty-five and a half billion pounds in '61, it reads this is 2% above revised 1960 and one and a half of one percent above the previous high record set in 1956.

Q. Would it be possible, Mr. Jacoby, to ship milk from [fol. 224] Milwaukee, Wisconsin, or Chicago, or other areas, to supply the Pensacola area without having to depend upon the producers located in the State of Florida?

A. Yes, our service would consist of selling milk, say, out of northwestern Wisconsin, in thirty-six hours delivery to Florida, Pensacola, it would be milk approved by for Interstate shipment as put out by the United State Department of Health Service, which is an accepted authority, by various health authorities in the various states.

Mr. Harrell: We would like to introduce this Milk Production and Dairy Products booklet, DA 3 into evidence compiled by the Department of Agriculture.

Mr. Horne: You want to introduce this?

Mr. Harrell: Yes. The purpose for this is to show the surplus situation and there is no need for regulation at this [fol. 225] time.

Mr. Horne: Well, we are going to object to its introduction.

Judge Jones: We will let it in for what it is worth, if anything.

Mr. Harrell: All right, sir.

Received in Evidence and Marked Plaintiff's Exhibit No. 4.

Mr. Harrell: Come down. Mr. Fisher will you take the stand for one further question.

Mr. E. V. Fisher resumed the witness stand and testified as follows:

Direct examination.

By Mr. Harrell:

Q. You are the same Mr. Gene Fisher who previously testified?

A. Yes sir.

Q. Mr. Fisher, is there a surplus of milk in the State of [fol. 226] Florida?

A. There is with this milk coming in.

Q. How long to your knowledge has this surplus existed?

A. Well, I might say for the last six weeks we haven't been able to fill orders that have been requested by certain distributors. We asked them to go outside for their milk.

Q. But you made a finding of fact in your order that there is a surplus of milk in Florida, isn't that correct?

A. There has been at times.

Judge Carswell: You mean produced in Florida?

Mr. Harrell: Yes sir.

Judge Carswell: I would like to get that clarified—milk produced in Florida is one thing. Is there a surplus of milk produced in Florida for Florida needs?

[fol. 227] A. I would say no, as a rule. Florida is not what we construe as a dairy state and we don't produce all of our needs in Florida.

Mr. McClain: I hate to—

Judge Jones: Who is conducting the examination here?

Mr. McClain: How's that?
Judge Jones: Who is conducting the examination here?
Mr. McClain: I just wanted to ask a question.

Mr. Harrell Continuing:

Q. Mr. Fisher, is it your testimony there is not a surplus in Florida produced milk in Florida, is that your testimony?
A. That is my testimony, when we can use this Florida produced milk in the proper channels, we have many mil-
[fol. 228] lions of gallons of imported milk in this State.
Q. What was the purpose of Order 20-17, Mr. Fisher?
A. That was controlling the surplus of Class 1 milk, the Class 1 needs of a plant.
Q. Would you define for us what surplus milk is, Mr. Fisher, according to your understanding?
A. Surplus milk is any milk not needed in Class 1 sales, which is that milk, whole milk, used for human consumption.

Mr. Harrell: That is all.

Examination.

By Mr. Horne:

Q. Just for the record, Mr. Fisher, surplus milk doesn't mean that the milk isn't needed. Would you tell the Court some of the things that surplus milk is utilized for?
A. They use it, for instance, in buttermilk, in chocolate milk, they use it for cottage cheese, for ice cream manufac-
[fol. 229] turing, there are millions of pounds of powder brought into the State and what we call a four one condensed is brought in for ice cream purposes, which we cannot possibly supply.
Q. Is it not a fact, the distributor must have more milk than just his Class 1 needs?
A. In order to operate he must have it.

Judge Jones: Have you finished with this witness?
Mr. Horne: Yes sir.
Judge Jones: Step down.
Mr. Harrell: Your Honor, that concludes all the testimony that we have, I believe. It might be that we will have one or two short things after lunch, it will be short.

Judge Jones: You don't want to rest at this time?

Mr. Harrell: No sir, I would prefer if we could have [fol. 230] a break for lunch before we rest so that we may look and see if there is something else. I believe we have virtually finished.

Judge Jones: Court will be in recess until 1:30 PM.

At 1:30 PM Court reconvened and the following proceedings were had:

PLAINTIFF RESTS

Mr. Harrell: Your Honor, the plaintiff rests with the sole exception of making a request of the Court that we be allowed to supplement the record with respect to exclusive jurisdiction by documents of the military establishment at Panama City, known as the Navy Mine Laboratory. We have nothing in the record and we will either make the record speak the truth if the jurisdiction were not ceded. It is our understanding that it was but we do not have proof in the record with respect to it. Also, Mr. Horne has stated he would not contest any proof we put on in respect [fol. 231] to it. We have some proof in the form of letters which are not certified by the Secretary of State with respect to the matter described by book and pages. In other words, I want to be sure that our record is complete with respect to that.

Judge Jones: Well, you may submit documentary matter or other evidence, submitting it first to the defendant to give it an opportunity to oppose its receipt if they see fit. Does that procedure suit the Commission?

Mr. Horne: Yes sir.

Judge Jones: When do you expect to submit it?

Mr. Harrell: Well, Your Honor, I have written the Secretary of State a week or ten days ago making the request for the information. When I speak of the Secretary of State I am speaking of the Secretary of State of Florida [fol. 232] and I have not received a reply, and, frankly, I will pursue it with all diligence. Judge Carswell has told me that the United States Attorney at Pensacola might have information that would be helpful in this particular respect.

Judge Jones: You now rest?
Mr. Harrell: Yes sir.

DEFENDANT RESTS

Mr. Horne: The defendant rests.
Judge Jones: How much time for argument?
Mr. Harrell: We would like thirty minutes.
Mr. Horne: I can conclude within that time, Your Honor. We will both endeavor to.
Judge Jones: Well, we will hear from the plaintiff. Keep track of your own time.
[fol. 233] Mr. Harrell: We would like to divide our time, if we may.
Judge Jones: You may divide the time and reserve such as you desire for rebuttal, or see fit.
Mr. McClain: May I ask one question, Your Honors, will we have an opportunity to submit briefs, up to this time that question has not arisen?
Judge Jones: We will appreciate the filing of briefs and we had rather expected that we would have briefs that we could familiarize ourselves with the legal contention before we sat down here this morning, but it would be appreciated if such briefs be filed that they be filed promptly so that we can get the case disposed of while we are still fresh in our recollection as to what has transpired. I take it that somebody is going to supply us with a transcript of the record so that we may review it and determine what the evidence is here.
[fol. 234] Mr. McClain: Would twenty days be all right?
Judge Jones: For the filing of briefs?
Mr. McClain: Yes sir.
Judge Jones: If you need that much time, certainly.
Mr. McClain: I have just talked with opposing counsel. I just came into this case. Your Honor, I will go along with any proposition, but since he has indicated he is under considerable pressure also in some other matters, I make that suggestion for the consideration of the Court.
Judge Jones: How much time will you need for reply?
Mr. Horne: I was just talking to Mr. McClain, and I can [fol. 235] submit it within ten days.

Judge Jones: Well, plaintiff will file briefs within twenty days, the defendant in ten days, and if the plaintiff wishes to respond it may do so. If it does so, do so instanter or a little quicker.

Closing Argument by Mr. McClain for Plaintiff

I will take only fifteen minutes and if the Court will give me three minutes warning before my fifteen minutes are up, I would appreciate it, so that I won't go over my time.

Judge Carswell: Mr. Clerk will you keep up with the time?

Mr. Clerk: Yes, Your Honor.

[fol. 236] Mr. McClain (Continuing):

Your Honor, as I would like to first say that we are dealing here with Chapter 501, Florida Statutes, which has been properly denominated by counsel for the Commission, and in no derogatory way, as a scheme of regulation. It is our position that it is a scheme of regulation to insulate, isolate, the Florida milk producers and protect them, and has a direct bearing upon the free flow of milk between States, and gives preferential treatment to the Florida producer and has such a burden, or places such a burden upon the procurement of milk, either by the distributor from without the State or his sale of it without the State, that it undoubtedly offended the Commerce clause.

I believe, also, that it is in the pleadings, and a commission in this case, that the plaintiff itself is deprived of certain Constitutional rights with respect to right of contract, equal to protection of law, to which I will address a few remarks later on, although the basic issue is Interstate Commerce.

[fol. 237] I would like to call the Court's attention, first, to Florida Statute 501.02, paragraph 6, which is very short: "A producer means a person producing milk within the State and where the term dairy farmer, or producer, is used in this chapter or any other laws referring to the powers and duties of the Florida Milk Commission, the two terms shall be construed to mean one and the same".

My point is, of course, that this chapter authorizes the Commission to deal solely and only with Florida producers, that the chapter is set up, the law is set up, and the regulation for the protection and for the control of the Florida producer and distributor.

Now, with that in mind, and realizing that the Legislature itself gives this Commission no power over anyone except a Florida producer, and a Florida distributor for that matter, I would like to come to this question of bases which has been mentioned here today, but first I would like to point out that the Administrative Commission, Mr. Fisher, testified without question, in my opinion, the record will [fol. 238] bear it out, and we are talking only about the Pensacola area in this case, that the distributor must take all of the milk tendered by the producer in the Pensacola area who has this so-called relationship with the plaintiff, with the distributor, all of it.

He also stated, if my memory is correct, that insofar as these percentage bases were concerned, that when that milk was sold, or all milk was sold, that milk sold at the Class 1 channel, which means nothing except what we call in common terms "drinking milk" to the consumer, as distinguished from manufactured milk of cottage cheese, or what not, buttermilk, we call it sweet milk, that is used for table purposes. That the Florida producer must be given this preferential treatment of percentage, and must get the first take, or cut, out of the Class 1 sales of the preceding month, because naturally, this accounting has to be made retroactive to know what the sales have been for the month.

He also admitted, I believe, and the record will show, that if the plaintiff should sell a million gallons of milk [fol. 239] to Ft. Benning, Georgia, the camp at Ft. Benning, Georgia, that insofar as the present orders of the Commission are concerned, the plaintiff would have to account to the producers, the Florida producers, with respect to that milk sent out-of-state at the price of 61¢ per gallon according to their prorata percentage or base.

Judge Jones: Well now, if there is anything illegal about the section of that charge, tax, or whatever you want to call it, that does not reach the statute itself to make it invalid, would it?

Mr. McClain: Your honor, as I understand it, the regulatory (in order not to be odious in my language, I call it attack), we will call it the regulatory charge. I understand that that is a Commission charge, but I believe under the authority of the statute—I stand to be corrected on that—but it would void, I think—

Judge Jones: You think that the whole regulatory [fol. 240] scheme would fall with that?

Mr. McClain: So far as this particular area is concerned, yes sir.

Now, I want to say definitely that I don't think the military milk problem is not out of this question, for two reasons: first, because of the Interstate aspect of which I have spoken. And Secondly, because when I understand the temporary hearing was held, at that time it was unquestioned as to whether there would be a vote by the producers as to whether they would permit this milk to be sold at a lesser price. They voted against it.

But Mr. Fisher has told us from the stand today, if that milk is sold to a military installation, it must be accounted for as Class 1 milk. So, we have got a double-barrel proposition with respect to military milk, plus this tax or regulatory charge, or whatever you want to call it. So, we say so far as it affects the military dispatch, there are three reasons.

Now, I want to go more directly into the Interstate [fol. 241] Commerce question with respect to these bases. And I want to point out to this Court that these bases form a permanent marriage. This is not some voluntary contractual relationship, and that the statute provides (and again I will not bore this Court or take its time in reading anything) and I will just call its attention to one section of the Statute 501, paragraph 4, of the Florida Statutes which says: "The Commission shall set a standard date as a date from which not less than ninety days written notice in writing in advance must be given the producer, or the distributor, involved, to the other before any such theretofore established relationship may be terminated. Unless such notice is given such relationship will not be terminated even though just cause exists for termination,

unless just cause exists excusing the failure to give such notice".

Just above that is paragraph 3. It says: "this relationship shall not be terminated without just cause therefor". In other words, there is no way this distributor can ever get out of this base relationship except going on bended [fol. 242] knees to the Commission and say we have just cause to terminate this relationship. It is a permanent, continuing, binding, statutory imposed obligation, and Commission imposed obligation.

Judge Carswell: And the fact that you can buy milk 20¢ a gallon cheaper would not be just cause?

Mr. McClain: It has been so held by the Supreme Court of Florida, and that is the position of the Commission, and has been.

Now, there is the posture, I think we will have to consider this. Mr. Fisher, also said from the stand that no Alabama producer—I only use Alabama because it is closer than any other state—could possibly get a look-in on these bases.

Now, I realize that they have not stated expressly, that the Commission has not stated, that you are prohibited from buying any milk from outside of this State. But they have said this: you must buy all the milk tendered by these producers who have this so-called base relationship, [fol. 243] regardless of how much it is, you must account to them on the basis of your Class 1 sales, regularly, and if you sell it out of the state you must account for it at Class 1 prices, and you must give them the first look-in, no matter if you could go buy your milk at 10¢ a gallon, 20¢ a gallon, 30¢ a gallon. And, of course, it is the position of the Commission, while we don't say that you can't go buy milk elsewhere, we just say you take care of the home folks first, and you give them the first cut at it, no matter how much they produce, you take all they offer you, and you give them the first pro-rata part of this higher price.

Now, we say that that is a double-edged sword. That it impedes and obstructs unduly the flow of milk into this State, and also prevents the distributor from freedom of contract with respect to his ability, economically, to go

out and procure his milk supply in the way we thought, at least I thought and still contend, that our Interstate Commerce clause was intended to operate.

Now, I want to say one other thing in this connection. [fol. 244] I want to call your attention to the case of *Baldwin* v. *Seelig*, which was written by Justice Cardozo back in 19—the date is not too important—1934, it is found in 294 U. S. page 510. I do not have the Supreme Court Reporter's citation with me. It is 79 Law Ed. page 1032.

There we had the conference situation. They had the conference situation. There a New York distributor was procuring a great deal of his milk supply from elsewhere. He was bringing this milk into New York at a cheaper price than he could buy from the New York area producers.

Now, it is true, Your Honor, that the Milk Commission has said to this distributor who protested the Constitutionality of this provision, which is the provision that was read to you this morning, which said it would be unlawful to sell it at a lower price if you brought milk within the State than it would be paid to the State, either the producer or to sell it at retail, or wholesale if there be wholesale prices. Now, Justice Cardozo, made several very interesting statements in this case, and I am not going to do any [fol. 245] more than read you two or three sentences, because your Honors may be familiar with this case.

Now, you may say the statute has not been invoked here in Florida. You are asking us to decide an academic question. But I say to you, the testimony from this stand today on the converse, if we are selling milk today out of the State to Fort Benning, Georgia, or at the camp at Columbus, Georgia, we have got to come back and pay our producers here in Florida 61¢ for it. It is a reverse process. But I can't see any promise, and that is, an Order of the Commission. Mr. Fisher testified to that from the stand —we are not talking about an academic matter, we are talking about a situation in which it, Polar Company, sends its milk out of the State and sells any Florida milk to a military installation—I am confining myself now to the Interstate Commerce aspect of this, and I have left the military thing for the moment, that is another issue—I say

that it is just as much an impediment, to do that as Mr. Justice Cardozo, speaking for a unanimous court, in the [fol. 246] *Baldwin* case there, it was to try to regulate and say what milk should be paid for that came from Vermont into New York.

Here, it goes, say, from Florida into Georgia. And it seems to me that we have got these two basic questions in this case—in this case we have got this problem of military milk, which I say certainly is not out of this case for the three reasons which I have stated. We are in a worse position than we were when this temporary injunction was heard, because had the producers voted to permit their milk to be used for military purposes, they would have been paid at the rate of 40¢ per gallon. They voted against it, so now Mr. Fisher tells us today if we sell any milk without the State, we have to pay 61¢ a gallon. So as Alice in Wonderland said, our position is getting worser and worser, instead of better with respect to military milk, and again that is an impediment on the flow of milk outside of the State to a military installation, and in Interstate Commerce.

Now, I want to call the Court's attention to a case with which I am sure you are familiar, that is now in the United States Supreme Court. Unfortunately I do not have the [fol. 247] official citation. I have a photostatic copy of it.

A three Judge Federal Court, in the case of United States of America, plaintiff, vs. William E. Warner, Director of Agriculture, State of California. The Attorney General of the State of California, in which the three Judge Court was held—I will be glad to get you the official citation, it is in the advance sheets, but I don't have it with me—in which they held that the State of California Milk Board could not regulate the producer prices, or the wholesale and retail prices, with respect to military milk; that is, milk sold to military installations under the exclusive jurisdiction, because one, of the exclusive jurisdiction question. And secondly, because it was interference with the procurement with the provisions of the United States Government as provided by Congress. And I think it is connected with the military question, and we will be glad to put this in our brief. That is one case which I think is quite relevant.

Judge Carswell: That California case, is that the one [fol. 248] that is now pending in the Supreme Court?

Mr. McClain: It is in the Supreme Court, I think they took jurisdiction about three or four weeks ago.

Judge Carswell: And the constitutionality of that Act, the California Act, as such, was part of that litigation of the three Judges' Court?

Mr. McClain: That is my understanding.

Judge Carswell: Have you anything to say about the comparison of the California and the Florida Statute?

Mr. McClain: I couldn't give you the precise comparison, Your Honor, now, but I will be very glad, sir, to put it in the brief. I say, at the moment, I came into this case two days ago, and I am not quite prepared, usually I am, I apologize.

Judge Carswell: That is a New York Statute, and is [fol. 249] similar to the Florida Statute?

Mr. McClain: The one I referred to and cited as an example, yes, sir, the provisions are identical.

Thank you, sir.

Mr. Harrell in Closing Argument

Your Honor, I will just use a few minutes here, and then save most of my time for rebuttal.

I would also like to call the Courts' attention to the case of *Pacific Coast Dairy* vs. *The Department of Agriculture*. That case, too, deals with military milk. It was decided on the same day by the United States Supreme Court as a similar type case, but the distinction in this case was this: That if exclusive jurisdiction has been ceded to the United States, then any law which attempts to fix the marketing prices of wholesale or retail or producer prices for milk delivered on the military reservations, is invalid.

Judge Carswell: Mr. Harrell, as I understand that ar- [fol. 250] gument correctly, what you are saying is, granted for the moment for the purpose of argument, the other part is not well taken, the Act as such is constitutional?

Mr. Harrell: Yes, sir.

Judge Carswell: But insofar as it affects military milk in these dairies where you have shown, or claim to show, that there is exclusive Federal jurisdiction, that there the

obligation, the Act is unconstitutional, and to that extent in any event you should be sustained?

Mr. Harrell: That is correct.

Judge Carswell: Is that what you mean when you are talking about this exclusive jurisdiction?

Mr. Harrell: Yes, sir, that is right. And also, not only that along with the corollary, of course, is that the State of Florida has no right to impose the tax on milk which was produced and delivered, exclusively, to military in-
[fol. 251] stallations.

Judge Carswell: Each and every act should be set aside insofar as military milk is concerned?

Mr. Harrell: That is correct, insofar as military milk is concerned. That is exactly our position.

Then we have another further position, which is closely analogous to that, that dealing with the military milk—and we say this, that the right to the contract is impaired by the prohibition contained in the Milk Commission Order with respect to the pricing of milk delivered at military installations, for example, Mr. Zirkelbach, testified that he did own milk, over a million dollars of milk fit to be furnished to Fort Benning, Georgia, at a price (my memory might be incorrect) I believe of 58¢ delivered at Fort Benning. Obviously, if he has to pay 61¢ for milk when he has previously had a contract, and obligated himself to deliver milk at 58¢, we feel that his right to the contract has been impaired, and that is in violation of the Constitution.

[fol. 252] Judge Jones: Is there any way that he can show you what milk goes to Benning?

Mr. Harrell: I will have to—

Judge Jones: Unless he has a better recollection than he had on the stand, he didn't have books, records, or memory, when he was on the stand of what milk he got, when, where.

Mr. Harrell: Well, that is true, but we take this legal position, Your Honor, and I am not attempting to evade the question, but we take this position, that suppose he wanted to ship Florida milk to Fort Benning, for example, then, if he did and he could prove to the satisfaction of

the Milk Commission that Florida milk was going there, would he have to pay 61¢ for this specific milk?

Judge Jones: Well, if he can buy and sell military milk without regulation, then in order to avoid any regulation, [fol. 253] all he has to do was to flow the same thing through the same vats so that some of the milk that went to Benning came from the Florida producers, he would have to keep records, wouldn't he?

Judge Carswell: You admit that he would have to keep some kind of records, there is no question about that, is there?

Mr. Harrell: It would be incumbent upon him to prove it, certainly that he would have to substantiate with records, but suppose he said this, suppose that he said that we would use this man, John Adkinson because he is No. 1 producer in the area—suppose that he was sending John Adkinson's milk, and he said, "John, deliver this milk, I have got a tanker going to Fort Benning and I want to use your milk this afternoon, and deliver it to me, and I am going to process it and run it off the tanker". Now, would he have to pay 61¢ for John Adkinson's milk that was delivered? I am assuming, of course, that he would [fol. 254] have the records in which it would be set up in particularity, that would be a matter of proof I should think, but would he be bound to pay 61¢?

Judge Jones: There is no evidence that any of John Adkinson's milk can be traced to Fort Benning or any other military installation?

Mr. Harrell: No, sir, but because he says he has delivered milk—in other words, he has put it all in the tank together, he testified I believe that his milk was like sardines, he put it all in the tank and distributed it wherever needed.

Judge Jones: That makes it all military milk?

Mr. Harrell: No, sir, I would not contend that.

Judge Jones: Then it makes none of it military milk. And if it makes some of it military milk, how are you going to tell when it goes into the hopper which it is, and who to pay?

[fol. 255] Mr. Harrell: I think he would have to separate it.

Judge Jones: Don't we have to try this case on the facts that are before us?

Mr. Harrell: Yes, sir.

Judge Jones: We can't spell out an unconstitutional statute and the administration of it on the bookkeeping that you are going to do after this case is determined, are we?

Mr. Harrell: I should think not, Your Honor. But also, I should think you would have to have sufficient facts to show that certainly he has contracts in which he obligates himself to supply milk to Fort Benning, Georgia, he has the contract, he has testified about them, and if he uses any of that milk, he has testified that he put all of the milk together and he delivered it as his needs were.

[fol. 256] Judge Jones: And if military milk falls we never reach the other question, do we? Because everything that goes into the hopper out of it comes the military milk. The whole statute falls because he puts everybody's milk through the same vats, tanks, and process.

Judge Carswell: We concede that a certain per cent of his total purchases went to military milk, and if it were so found that this exclusive jurisdiction factor sustained his position, that then you would have to account to the Milk Commission, it otherwise being constitutional, as to what portion of it was.

Mr. Harrell: That is correct, would be put to his proof.

Judge Carswell: A normal regulatory process that you would concede here that the Milk Commission has the right to determine what was military, and what was not?

Mr. Harrell: I would say certainly, assuming now, we [fol. 257] are speaking academically that if the other part of the Act were upheld, certainly I would be the first to recognize it, unless he could prove it. I think the burden would be upon him to prove that this milk in truth and in fact was military milk. Yes, sir.

Judge DeVane: He couldn't do that. I asked him that question. I didn't ask it in that way, but I asked him how much milk was produced in Florida that he was required to take that he couldn't use in Florida, and he couldn't answer that question. He didn't answer that question. Until he does answer that question, I think, I am afraid, that he might be in trouble.

Mr. Harrell: But I think this, certainly the Court will recognize this, that the bulk of his business, as he has testified, deals with military milk. Certainly the largest percentage of his business deals with military milk.

Judge DeVane: I know, but if he is not required to buy [fol. 258] any more milk in Florida for 61¢ than he can sell in Florida for the higher price, he is not suffering, is he?

Mr. Harrell: Well, I would think he would be suffering, Your Honor, when his next door neighbor, who lives sixteen miles away, can buy milk at 40¢ and deliver it on the streets of Pensacola.

Judge DeVane: That is not the question. That is a different question, that goes strictly to the constitutionality of this Act in any respect and every respect.

Mr. Harrell: Yes, sir.

CLOSING ARGUMENT FOR DEFENDANT BY MR. HORNE

May it please the Court. The fundamental of this case falls down very briefly and simply to the proposition of the plaintiff, really, when you separate all of his contentions, contests the right of the State to regulate this to the extent that it can set a minimum price to be paid [fol. 259] by a distributor to a producer and require that he take a certain percentage of milk from those people he does business with. That, notwithstanding the rather broad and far reaching allegations of the complaint to the extent that:

1. The Milk Commission says that we cannot buy out-of-state milk broadly stated and ending at that point; and

2. That we require them to take all of the surplus milk in Florida.

To those allegations I will simply say to the Court there is no proof at all in this record of any effort to exercise such jurisdiction over this distributor or any other distributor of Florida. Nor have we indicated to him any intent to make such an exercise of authority over them.

To the question that Judge Carswell raised with response to Mr. McClain's argument that could the cheaper

milk being available elsewhere in the United States be a just cause for the termination of the base relationship that we talked about earlier. I would agree with Mr. McClain [fol. 260] that that is not a just cause, but it isn't by the Court's decisions, but the statute itself specifically says that lower available price.

Now, to that point, it may sound a little bit harsh for the Legislature to make such a decision; I would simply suggest that as the expert has indicated in his testimony, there are times in every year when there is a distress milk situation in Wisconsin and all over this country, and if a distributor—and this is exactly what the Supreme Court was talking about when considering this very question of the right of the State to regulate in this particular field—if the distributor goes along and uses his base relationship or whatever it was with his producers, local producers, until a distress situation existed in Wisconsin and then said, no, no just cause exists, we don't want your milk any more, we don't want but five gallons or none, or we don't want any of your milk for the time being. Then they go buy distress milk in Wisconsin, or wherever, and because of the nature of this particular business:

1. The producer finds he is unable to sell his commodity [fol. 261] to anyone else because of State laws and Federal laws, because it has to be processed, a procedure which is not available to him, and he can't sell to another distributor because that distributor is also involved with his own producers, and he can't turn this particular animal off. So by the time the distributor then would return for the wholesome supply of milk there, the producer economically would not be there to submit the milk to him. So, the producer simply would not be available to him to do business with him.

Now, then, I don't want to fail to direct my attention to some of the particular points raised here, but since there is no evidence whatsoever that the Milk Commission has impeded the flow of milk from out-of-state—I want to remind the Court again that the only allegation in this complaint is that over 70% of the milk that they fulfill their responsibilities, be that what they may, comes from out-of-

state. And not one person today has indicated that the Commission has tried to stop it or has indicated that it is the law, except by reading of statute, which is followed [fol. 262] by one of the sections of the Florida Statutes which says in effect, "nothing herein contained shall be construed to interfere with Interstate Commerce clause of the United States Constitution and as it is construed". That is in the very statute that was read to you earlier this morning.

When the proposition as a legal proposition comes to the Court, and I submit that what we are here concerned with is really an interpretation of the statute and the authority of the Commission under it. Actually you don't even have before you the Commission Orders unless you consider this attachment to the complaint are before us, to that extent they are, but for the most part the statute, itself, stands or falls on the question of whether it is reasonably enforced to the constitutional mandate of the Legislature of Florida.

The Supreme Court of our State in 1960 was presented the identical question before you. It cited the *Borden Company* vs. *Odom* and others. It appears in 121 Southern (2d) 625, and they are talking about the same question, the [fol. 263] state problem, whether or not the State can create this base relationship, and then set a minimum producer price to protect and keep these producers in business during periods of surplus throughout the national economy. And to this the Court stated, brought into sharp focus was the due process clause in that they contended that the violation of Section 12 of the Declaration of Rights of the Constitution of Florida was involved, and the 14th Amendment to the Constitution of the United States.

This whole base proposition was clearly and succinctly stated to the Court, great testimony was taken, and the Court concluded by saying, "clearly the Commission has the power to require the distributor to take milk delivered pursuant to a previous course of dealing between the parties. It may also authorize the adoption of what in the trade is known as utilization prices, (That is this 'Class 1, 2, 3 and 4, I mentioned to the Court this morning) by virtue

of which the producer is paid the highest price for Class 1 milk, and correspondingly lower prices for Class 2 and [fol. 264] Class 3 milk. The greatest advantages of such a system clearly flow to the distributor for he pays for milk based upon his own utilization, and pursuant to such a system so long as the Commission acts within reason may encourage or require the distributor to take all of the producer's milk. Appellants consented to abide by such valid acts and orders of the Commission when they applied for and received their licenses to operate". Now, that is the State's enunciation on this particular problem.

Judge Jones: Does that case involve the Commerce clause?

Mr. Horne: Not directly, no, sir. I am moving into that aspect right now. And I want to quote also from this *Baldwin* vs. *Seelig* case in order to distinguish it, because I think it is very important that it be distinguished for the Court.

This is the case that Mr. McClain cited to you there, and in that particular case, this *Baldwin* vs. *Seelig* case, which [fol. 265] is 294 U. S. 520, approximately there, we will cite it specifically in the briefs that will follow. In this particular case the New York distributor was purchasing milk in another state and bringing it in in cans and 90% of that sale, 90% of that acquisition was turned around and sold to other distributors in kind. In fact in the same cans in which it was transferred across the state line. The other 10% wasn't processed to the extent that we have it here, but it was bottled and sold locally, but there was one other thing that isn't here, and this is a real distinguishing factor between the *Baldwin* vs. *Seelig* case, and the one presented to you here now; and that is, there, the State said to the distributors in New York, it is unlawful for you to sell one gallon of milk from another state, under any circumstances in New York, unless you have paid to the producer in Vermont the same price that New York requires to be paid its producers.

The Court there said, first of all, that the New York Milk Control Act with the aid of regulations made thereunder [fol. 266] has set up a system of minimum prices to be paid by dealers to producers. That system, by-the-way, may it

please the Court, is one predicated upon a base relationship almost identical to the one presented here. A base relationship with a producer price required by the Milk Act of New York and to both. Going further the Court here says, this is the Supreme Court of the United States:

"The validity of that system in its application to producers doing business in New York, the State has support in our decisions" and, of course, they quote the *Hallmark—Nebbia* case—in this field.

The great distinction between that case is the fact that we do not have that compulsion that you have got to pay these distributors. We don't care what they pay, they can pay 10¢ a gallon for their milk from Wisconsin so long as they comply with the rest of our laws.

Briefly, in addition, because it sets forth further the *Highland Farm Dairy case* vs. *Agnew*, which is 300 U. S. 610, walked almost down an identical situation that we [fol. 267] have here insofar as it involved incidental interference with Interstate Commerce, it involved an attack by the State there to regulate this particular industry, and it had a delegation of authority which is one of the points they raise here to a Commission appointed under a scheme of the statute, and they went into this proposition with this observation, the power of the State to fix minimum prices for milk, in order to save producers, and with them the consuming public, a price cutting so destructive as to endanger the supply, was affirmed by this Court, evidencing to you that from the time of the *Nebbia* case, on through the tremendous impact of the increase of regulations in this field of milk, included the continued enhancement, the improvement, and encroachment, if that word doesn't bother you, of Federal regulations and orders in this same field. And this actually has become an economic metamorphosis in the field of milk regulation, because milk orders are moving in all of the metropolitan areas of this nation, and they use incidentally classification structure of milk, now [fol. 268] identical with that used in Florida.

To the question then, specifically, of whether or not we can collect this tax, irrespective and assuming for argument the existence of exclusive jurisdiction on any of the

military installations to which this distributor supplies milk, assuming that for the purpose of argument—

Judge Jones: Do you think there is any doubt about that?

Mr. Horne: Sir.

Judge Jones: Do you think there is any doubt about that?

Mr. Horne: Not seriously, no, sir. I think whether it is exclusive or not depends on the two cases the Supreme Court handed out the same day, one saying that you can regulate, and one saying you can't. The Supreme Court recognizing the differential, said, that we know the difference is whether this land was ever ceded to the Federal [fol. 269] Government, and, therefore, I would concede exclusive jurisdiction to that degree.

But assuming that, that is to concede that this regulatory fee is not a constitutional regulatory fee and cannot be attributable to all of the gallonage delivered by the distributor from his Florida plant, to that point I direct your attention to the language of the statute "for the privilege of continuing in or engaging in the business of distributing milk, or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor (I might also add that the same tax is imposed upon every producer) a tax in an amount equal to 15/100 of 1¢ upon each gallon of milk distributed".

Now, this is not a tax or fee upon the milk. Therefore, it is not a tax or fee upon the recipient, ultimate recipient, this is a privilege tax based upon a gallon.

Now, one other thing that is really important because it leads into the decision which I will give you in just a second, and that is that the Legislature went further here [fol. 270] and said this: "That the Comptroller of the State of Florida would administer this money. That it would be received and held in separate trusts by him and administered then according to budget by the Florida Milk Commission, but when the proceeds of this tax exceed 125% of the budgeted needs of this licensing and inspecting body, then the tax abates". Then the tax abates. Under no circumstances would any of the funds derived from this gallonage tax regulatory fee ever be utilized in the general

revenue fund of the State of Florida. It is possible that the tax or fee abates at any time when it exceeds this 125% of the original calculation.

Now then, the fact about it, the fact that a lawfully constituted body can regulate, and expect, and require, of those inspected a fee or tax, whatever you want to call it, designed only to compensate them for the cost of that is the case is a lesion to it, with respect to the Commerce Section U. S. *Pure Oil Company* vs. *State of Minnesota*, found in 63 Lawyers' Edition 180, says incident to its power to make valid inspection laws, States may charge [fol. 271] fees reasonably sufficient to meet the expense of inspection and such a fee is not properly assailable as a burden on Interstate Commerce.

The only matter in which such a regulatory fee may be subject to attack is that it is so excessive that it is in effect a tax for revenue purposes. Not one bit of testimony as to the unreasonableness of this fee in this particular case and is void, therefore, as a burden on Interstate Commerce. Not the first suggestion that he is treated any differently from anyone else or that this is done only on imports.

Every gallon Florida produces, Alabama produces, Georgia produces, that is processed, pasteurized, homogenized, and been cartoned and sold out of this Florida plan pays just like everybody else in Florida pays, and this is not a penalty, it is not a tax derived to create revenue under the true definition of the tax, it is a regulatory fee. It is a fair one, there is no evidence to the contrary, and, gentlemen, I think the Court has found from the pitiful lack of any evidence of any intent to draw a barrier, directly [fol. 272] or indirectly, by artifice or whatever, against the free flow of commerce into this State. The pure fact that 70% of his product comes from that would belie such a suggestion, or that this Court has created any circumvents the laws and regulations with respect to Interstate Commerce, not one bit of evidence to the point. It simply falls down to the fact this man, and evidenced by his own testimony here indicates that he doesn't want to succumb to any authority whatever, and will not, will not let this Court quicklify that this act, the Supreme Court has said similar ones are constitutional, that this regulatory fee can be

collected, and this man has to subordinate to some valid governmental authority. Thank you.

Judge Carswell: Mr. Horne, let me ask you a question, with reference to exclusive jurisdiction, I understood, I think what you had to say about the license fee, or tax, I don't want to get into any argument about that, but isn't there another aspect of that exclusive area, what about the [fol. 273] 61¢ a gallon—how does that work out?

As I understand it, just to use something specific, Mr. Zirkelbach says he buys about five million gallons a year. Also, in this record it shows some 70% of that is bought out of the State of Florida; that is, some 3,500,000 is bought in Alabama, roughly, now that would leave some 1,500,000 that we are talking about, under your regulations, the Commission's regulations, that we are talking about?

Mr. Horne: Yes, sir.

Judge Carswell: Here is what I want to get straight in my mind, assuming for a moment that Mr. Harrell is correct in his position about the exclusiveness of the military milk, that the Florida Milk Commission hasn't got anything to do with that, as such. How does this 61¢ a gallon requirement affect the military milk? I want to get that clear in my mind if I can. I understand about your tax business, your license fee, so-forth.

[fol. 274] Mr. Horne: Yes, Your Honor, and I remember the testimony in response to the question. Actually, it is my considered opinion that there is no requirement that he pay anything for any milk going into military installations, there is no requirement that he do it. However, there is no military classifications under our law. It is my contention that unless he voluntarily goes and contracts he can't use Florida producers milk over here on military installations at all.

Judge Carswell: Why?

Mr. Horne: Because the producers over there have told him not to, and that is our law. They have said that you can't compel your producers to let you sell milk on military installations at a cheaper price unless he proposes to let you have it at a cheaper price. So, the producers over there having elected to have no relationship with military milk, he then goes elsewhere for the cheaper milk and buys it.

[fol. 275] Judge Carswell: This is purely for the purpose,

I want you to understand, to try to get it clear in my own mind, granted that there is nothing in this record to show what percentage he bought anywhere other than the 70%, there is no record, we have nothing here to show where his Florida milk went, whether it was on the streets of Pensacola, whether it went to Fort Benning, or whatnot. There is nothing in this record to show where it went.

Mr. Horne: Under our laws, Judge, it would have to have gone in Class 1 utilization, then 2, then 3, and then 4, it could not have gone into military.

Judge Carswell: Then you concede that the Commission has no authority, if he can show, I don't mean on this record, but in the future, if he can show a given set of facts that he bought milk in Alabama for 35¢ a gallon, and sent it to Fort Benning, Georgia, that is out of your department other than your claim on the license fee?

[fol. 276] Mr. Horne: Yes, sir.

Judge Carswell: You still contend that in spite of that fact you wouldn't make him take the Florida milk first on that?

Mr. Horne: No, sir.

Judge Carswell: You wouldn't count that on your quota first?

Mr. Horne: No, sir.

Judge Carswell: So Mr. Ard and Mr. Adkinson and these other gentlemen here wouldn't come first?

Mr. Horne: No, sir. If he can buy ten million gallons and deliver it to military installations we don't care.

Judge Carswell: You aren't counting that first, that is the thought I want to get.

[fol. 277] Judge Jones: You can keep him from buying milk in Florida and selling it to the United States Government for military installations?

Mr. Horne: We can require him first to attribute it to Class 1, 2, 3 and 4, beyond that, he could make an independent contract. That is the end of our regulation, Judge.

Judge Jones: Suppose he doesn't want to do anything except buy and sell milk to military installations, he is unable to do that under the Florida statute and regulation?

Mr. Horne: No, sir, if he didn't want to involve himself with Class 1, 2, 3 and 4.

Judge Jones: Suppose he wanted to buy, suppose he wanted to use the milk from the producers that are listed on the exhibit and he wanted to sell that milk to military installations under a contract with the United States Gov-
[fol. 278] ernment, or some agency of it, you say he can't do it?

Mr. Horne: No, sir. That's right, I say he cannot.

Judge Jones: That is moving in on the Federal Government, isn't it?

Mr. Horne: No,—yes, sir, it is saying he must first attribute it to a higher utilization, military milk is generally filled by a bid price and usually is distress milk.

Judge Carswell: Let's assume this man, as Judge Jones says, he just didn't want to get into anything but, maybe he just didn't want to sell milk on the streets of Pensacola, he just wanted to sell to Fort Benning and nothing else?

Mr. Horne: He can quit selling or he could quit having any involvement with the Florida Milk Commission at all,
[fol. 279] He could quit having Class 1, 2, 3 and 4 milk and service military installations.

Judge Carswell: Your definition there bothers me a little bit because, if I understand you correctly, military milk, while it was not under your jurisdiction, it is not even Class 1, it doesn't have anything, drinking milk.

Judge Jones: And unless there is distress milk the military goes without, doesn't it?

Mr. Horne: Their bid goes up, Judge, when there isn't.

Judge Jones: No, but you are not going to let him do business with the military on any basis. Suppose he wants to pay 61¢ for it and resell it to the military?

Mr. Horne: Oh yes, he can do that.

Judge Jones: No, he can't because it isn't Class 1.
[fol. 280] Mr. Horne: Well, he would have to determine it as Class 1 to do that.

Judge Jones: Who determines it?

Mr. Horne: The distributor would have to pay it as if it were Class 1 milk.

Judge Jones: As if it were, but you say it isn't?

Mr. Horne: No sir, there is nothing classified for military milk now. It is a separate classification under our general state-wide law, accellerated by a producer in a

milk marketing area, majority of them voting in this classification. When it is not voted in, there is no military classification, so there is no regulation at all. So a distributor can sell to military installations.

Judge Jones: It certainly comes as a shock to me that the State of Florida can deprive military installations of [fol. 281] getting wholesome milk for the people there to drink.

Mr. Horne: They can't, Judge.

Judge Jones: I don't think they can either.

Mr. Horne: Your Honor, I am saying as a matter of practice that all of the other milk marketing areas in Florida have military classifications of milk. If this producer wants Florida milk to fulfill a contract he can certainly buy it.

Judge Jones: Yes, but we are dealing with what we suppose are Constitutional issues here.

Mr. Horne: That's right. But when we don't regulate it at all, Judge, how can we be unconstitutional in it?

Judge Jones: But you do regulate. You won't let him buy it unless he can get the distress milk you won't let him sell it because it isn't classified. You don't recognize the [fol. 282] existence of the need of the military for milk.

Mr. Horne: I have over-stated that if that is your impression. All I am saying here is that when the producers don't vote in a military order, we have no order at all, and that without an order, the only orders we have are orders requiring our distributors to first serve, or attribute, to Class 1, 2, 3 and 4 sales. He could sell anything. If he wanted to go out of business over there, close up, and then use that plant to do nothing but service military installations, there would be nothing we could do about it, but he couldn't sell Class 1, 2, 3 and 4 milk.

Judge Jones: And sell milk to the military at the same time?

Mr. Horne: He couldn't do that at all unless he had a license, of course. This whole question has been before the Supreme Court some fifty times or more.

Judge DeVane: Of the United States?

[fol. 283] Mr. Horne: Yes, sir.

Judge Jones: Do you want to say anything about your

motion to dismiss, I don't think we need to hear from you on your Motion to Strike?

Mr. Horne: No, sir, I believe we will withdraw and rest on the argument of the case.

Judge Carswell: You are withdrawing your Motion—

MOTIONS TO STRIKE AND TO DISMISS WITHDRAWN

Mr. Horne: To Strike and to Dismiss and we will argue in our brief the question of Federal Courts of distinction that doctrine—

Judge Jones: Well, that is your Motion to Dismiss?

Mr. Horne: That is our Motion to Dismiss. We still argue that along with the other cases.

Judge Jones: Are there any Milk Commission cases where the Doctrine of Distinction has been invoked?

Mr. Horne: No, sir.

[fol. 284]

MR. MCCLAIN CLOSING ARGUMENT

I want to answer a few things that Mr. Horne has said. In the first place, Mr. Zirkelbach can't go out of business. He can't if he wishes because there is this order which has been talked about, he cannot terminate the relationship with any producer without just cause. You have to go before the Commission and prove just cause in order to even turn his plant into a complete military plant if he wanted to.

Now, I want to answer the Court's question about the fact that we are talking about hypothetical things. There is no evidence from Mr. Zirkelbach that any particular part of the Florida milk went, necessarily, to any military installation.

Let me tell you what Mr. Fisher said—we say this is a very subtle statutory regulatory scheme, and I say that deliberately, it is a device, it is an indirect means of doing exactly what they cannot do directly. And I will show you why—now, at the end of the month, if he sold only 30% [fol. 285] of his total sales in drinking milk and the rest of it to the military, and 40% of his production comes from Florida producers, all that milk that went to military installations is accounted for to this Commission and he is compelled to pay 61¢ for it. Isn't that something. Let's see

what they say on the one hand, it is like concealing the thimble, now you see it, now you don't. We don't have any classification for military milk, but we say this, any milk that goes to military is treated as Class 1 milk. And whatever percentage of military sales that month, plus other sales, these bases of the Florida producers are first applied and they get the first cut against it, which I have been trying to say. If 100,000 gallons went to military installations that month it was Class 1 and he has got to pay the Florida producers.

Now, you see Judge, it isn't that you separate it. You don't take milk that way. You put milk in big tanks. But [fol. 286] the point is they get it backwards when he starts to account for it, and any milk that he sold to military installations is accounted for as Class 1 milk and he pays 61¢.

Now, Mr. Horne, made an admission I didn't dream that he would make, that he is prohibited from using Florida milk for military sales, there is no military classification, he has got to use all Florida milk for other purposes.

Judge DeVane: You are not arguing that this plaintiff has to pay Florida producers for milk they never delivered to him, are you?

Mr. McClain: I am not arguing that, Your Honor. I am arguing when it comes to the accounting period, I am saying, sir, if the Florida producers furnished 30% of the milk that month, that they first look at his so-called Class 1 sales and the Commission makes him account for all military sales in Class 1 and raise these bases against that; and, therefore, makes him pay inevitably that amount. Now, [fol. 287] with mathematical servitude which at 61¢ a gallon for that proportion of the Florida milk and the bases guaranteed these Florida producers.

Judge DeVane: Well, that is only what he got from them.

Mr. McClain: Yes sir, but he shipped out of the state and he was made to pay 61¢ for it and it is an indirect way of doing it.

Judge Carswell: That applied to military milk as well as everything else?

Mr. McClain: Yes sir. Mr. Fisher admitted from the stand that they classified military milk sales as Class 1 milk, and the record will bear it out.

Mr. Harrell: I want to clear one point. The Court asked

me about the fact, about segregating his milk, and there was no proof that this Florida milk went to military in-
[fol. 288] stallations. There was certain proof, as I understood it, that about 75% of his business was military business and he bought some million gallons of Florida milk and poured them all into the same tank. It seems clear to me that on that basis certainly a portion of that milk had to go to the military by mathematical computations.

Judge Jones: Court will be in recess.

(Whereupon Court stood adjourned until further order.)

[fol. 289] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 291]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

POLAR ICE CREAM & CREAMY COMPANY, Plaintiff,

vs.

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION; and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida, Defendants.

OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW —July 26, 1962

Before JONES, Circuit Judge, and DEVANE and CARSWELL, District Judges.

CARSWELL, District Judge

Jurisdiction in this cause is predicated upon an averment of a constitutional question and jurisdictional amount.

Plaintiff is a Florida corporation located in Pensacola, Florida, and engaged in the distribution of milk and milk products. Defendant is the Florida Milk Commission, an agency of the State of Florida.

The Pensacola Milk Marketing Area came under the control of the Defendant on November 21, 1961, after a favorable vote by the producers and producer-distributors of that area as prescribed by Section 501.20, Florida Statutes. Thereafter, the defendant passed a number of orders having to do with the classification of milk, minimum prices for the sale of milk, base percentages for producers, and [fol. 292] other administrative details for fixing and maintaining a fixed price for milk.

Testimony was taken and arguments heard with reference to the following issues:

1. Whether Chapter 501, Florida Statutes, and the regulations and orders of defendant, as applied to milk delivered by plaintiff to military reservations, are constitutional.

2. Whether provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, impose an undue burden upon interstate commerce, and are therefore unconstitutional.

3. Whether the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, violate his constitutional rights of freedom of contract, due process, and equal protection of the law.

These issues are taken in order.

1. Plaintiff makes several allegations concerning the application of Chapter 501, Florida Statutes, and defendants' regulations and orders to "military milk" (milk delivered to United States Military installations). Plaintiff first attempted to show that the regulatory fee imposed on milk distributed by plaintiff to military installations is a tax imposed by the State of Florida, and, therefore, violates the supremacy clause (Article 1, Section 8, Clause 17) of the United States Constitution. However, the finding of this Court is that the fifteen-one hundredths (15/100ths)

of one cent per gallon imposed by the defendant is not a revenue raising device. It is in the nature of a regulatory fee based upon the privilege of doing business in the State of Florida, and not a tax upon milk.[1] Due to the above [fol. 293] finding and the absence of any showing on this record that the amount of the fee imposes an undue burden upon interstate commerce, we conclude that the imposition of the fee upon the plaintiff is proper, even though plaintiff delivers milk to United States military installations.[2]

Plaintiff's second objection concerning "military milk" centers around the Federal Procurement Statutes.[3] Plaintiff attempted to show that the provisions of the regulations and orders of the defendant and the provisions of Chapter 501, Florida Statutes, violate the Federal Procurement Statutes, and are, therefore, invalid under Article VI, Section 2, of the United States Constitution. In support of this contention plaintiff relies upon the case of *United States* v. *Paul*, 190 F. Supp. 645. This case is now pending in the United States Supreme Court. We cannot anticipate the total effect of the decision forthcoming from the Supreme Court; however, it appears to us that the *Paul case* does not present a comparable situation. In *Paul* the court concluded that:

> "(T)he California Milk Stabilization Act places a prohibition on the Federal Government within the meaning of the Public Utilities Case (Public Utilities Commission v. United States, (1958) 355 U.S. 534), and therefore so conflicts with the Federal Procurement Statutes and policy as to be invalid under the supremacy clause, Article VI, Section 2."

The distinguishing factor between the *Paul case* and the case at bar is that in *Paul* there was a direct imposition by the state statute upon the Federal Government acting in

[1] Chapter 501.09, Florida Statutes. 1956 Op. Atty. General of Florida 056-43, Feb. 16, 1956.

[2] Texas Co. v. Brown, 258 U. S. 466.
Baldwin v. Seelig, 294 U.S. 511.

[3] Armed Forces Procurement Act of 1947, 62 Stats. 22, 10 U.S.C. §2301, et seq.

its capacity of a consumer, by setting a minimum price for the sale of milk and imposing penalties on the seller *and* the consumer for its failure to maintain this minimum price. There is no showing here of any restriction placed upon the [fol. 294] price paid by the Federal Government for milk purchased for military installations. Indeed, there is no proof of any restrictions upon plaintiff from selling milk to military installations at any price agreeable to plaintiff and its customer, regardless of whether the military installation is located in the State of Florida or any other state. Further, there is no proof of any limitation imposed on the price that a customer must pay the plaintiff, be the customer military or civilian. For the above reasons the Court is of the opinion that the regulations, orders, and provisions of Chapter 501, Florida Statutes, as applied to plaintiff under the facts in this case, do not violate the Federal Procurement Statutes.

2. Plaintiff contends that the provisions of Chapter 501, Florida Statutes, as applied to him, place an undue burden upon interstate commerce. Plaintiff sought to prove that the "Base plan" as set up by the statutes, and the orders and regulations of defendant discriminate against out-of-state producers, and therefore, restricts interstate commerce. Plaintiff further contends that the base plan, or base formula, as set up by the defendants' regulations requiring plaintiff to purchase all the milk supplied by his producers operates as a restraint of trade in interstate commerce. This is so, it is urged, because after purchasing locally produced milk at sixty-one cents (61¢) per gallon plaintiff has reduced his financial ability to purchase out-of-state milk at a lower price with the practical result of the regulation preventing him from buying and selling out of state milk on a free market.

While it may be true that the purpose of the Florida Statute is to assist and protect Florida milk producers, this does not necessarily make the statutes unconstitutional. It must be shown that alleged discrimination against out- [fol. 295] of-state producers is a burden upon interstate commerce or actually restricts interstate commerce.[4]

[4] Milk Control Board v. Eisenberg Co., 306 U.S. 346.

Plaintiff relies most heavily upon the case *Baldwin* v. *Seelig*, 294 U.S. 511, for the proposition that Florida Statute Section 501.13(8) is unconstitutional as a restraint on interstate commerce. In that case the plaintiff, Seelig, Inc., a New York Milk distributor, purchased milk in Vermont at a lower price than required by New York statute. Ninety percent of the milk was sold to customers in the original cans, and ten percent was removed from the cans, bottled and sold to customers in New York City. The New York statute (which is identical to F. S. 501.13(8)) provided that there should be no sale within New York of milk purchased outside New York unless the price paid to the out-of-state producer was one that would be lawful in a like transaction within the State of New York. The Court restrained enforcement of the Act insofar as sales made by Seelig while the milk was in the original cans or packages, but refused to grant an injunction as to milk removed from the original cans and thereafter sold in bottles. The United States Supreme Court upheld the action of the trial court in restraining the enforcement of the act as to the milk in original packages and further held that it should have granted the final decree as to the rebottled milk also, since New York had no power to regulate the prices of milk in Vermont, and held that New York could not prevent the introduction of Vermont milk of wholesome quality into New York. The Court stated that New York's refusal to allow the sale of milk purchased at a lower price in Vermont amounted to a barrier to traffic between one state and another as effective as a custom duty.

The facts here adduced simply do not reflect a comparable [fol. 296] state of affairs concerning this plaintiff and the Florida Milk Commission. There is no such application of the statute in this case.

It is a settled principle that the Court has authority to determine whether a statute enacted by a state legislature is or is not constitutional. However, in order to justify a pronouncement that a legislative act is unconstitutional the case must be so clear as to be free from doubt.[5] While

[5] Powell v. Pennsylvania, 127 U. S. 678.

courts will pass on the validity of statutes when such a determination is necessarily involved, unnecessary decisions will be avoided,[6] and courts will not assume to pass on constitutional questions unless properly before them.[7] The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question,[8] and this is what the plaintiff would have us do. In *Baldwin* the Court found that the State of New York was attempting to regulate the price of milk in the State of Vermont. No such situation exists in the present case. Neither the regulations and orders of the defendant nor the proof presented by the plaintiff upon trial in this action show that the plaintiff is restricted from selling milk to consumers at any price agreeable to him and his customer. The defendant does not attempt to regulate the price that the plaintiff pays his out-of-state producers, nor do the regulations restrict plaintiff from purchasing out-of-state milk in any amount or for any price. This contention is without merit.

3. Plaintiff complains, finally, that Chapter 501, Florida Statutes, and the regulations and orders of the defendant deprive it of its liberty of contract and property.

[fol. 297] without due process of law, and deny him equal protection of the law. The rationale of plaintiff on the undisputed facts is to the effect that:

a. Plaintiff is required to take all milk tendered by its Florida producers at fixed prices and is given no assurance of any rate of return. Therefore, the regulatory scheme of the defendant is one-sided and results in violation of due process, and denies equal protection of the law.

b. The statutory and commission imposed restrictions and requirements deprive the plaintiff of its liberty of contract in that it is ordered to take all milk of its Florida producers, and is forced into contractual relationship created solely by the defendant, and plaintiff is not free to

[6] Crowell v. Benson, 285 U. S. 22.

[7] Champlin Ref. Co. v. Corporation Comm., 286 U. S. 210.

[8] Anniston Mfg. Co. v. Davis, 301 U. S. 337.

terminate this relationship except by showing just cause acceptable to the defendant commission.

The liberty of contract is the freedom from arbitrary restraint not immunity from reasonable regulations imposed in the interest of the community.[9] It is a well settled rule that the state may lawfully impose such restrictions in the exercise of its police power.[10]

The principle of due process of law has been said to secure the citizen against any arbitrary deprivation of his rights,[11] and it is a limitation upon arbitrary power and a guaranty against arbitrary legislation.[12] However, the states are not deprived of the power to regulate for the public welfare, but merely required to insure that the end be accomplished by methods consistent with due process.[13]

[fol. 298] Equal protection of the laws like due process is perhaps not capable of precision in its multifold applications, however, the guiding principle is often stated as requiring that all persons be treated alike under like circumstances and conditions.[14] Control over the business of producing or dealing in milk products is acknowledged to be within the police power of the state, and price regulations in that industry have been upheld in a number of decisions as not violating the constitutional right of equal protection of the law.[15]

From the above it is apparent that the real issue to be determined is whether or not the regulations and orders of the defendant and the provisions of Chapter 501, Florida Statutes, as applied to plaintiff are a valid exercise of the State's police power. The Florida Supreme Court has on at least two occasions expounded on this question and up-

[9] West Coast Hotel Co. v. Parrish, 300 U. S. 379.

[10] Id.

[11] Jones v. Brim, 165 U. S. 180.

[12] Nebbia v. New York, 291 U. S. 502.

[13] Id.

[14] Hartford v. Steam Boiler Inspection & Insurance Co., 301 U.S. 459.

[15] Nebbia v. New York, 291 U. S. 502.

held the statute.[16] We agree with that court's statement in *Shiver* v. *Lee* at page 321:

> "We have never found a stronger finding of fact and statement of policy as the basis for regulating and administering a great industry than that embodied in the two paragraphs preceding this for control of the milk industry. Chapter 19231, Acts of 1939, from which Chapter 501, Acts of 1953, was in the main drawn, was a complete departure from the previous milk control acts, in that it recognized the necessity for continuous control and supervision of the milk industry. One cannot read the findings of fact and statement of policy without being convinced that the paramount purpose of the legislature was to invoke the police power for protection of the public health, safety and welfare as well as the welfare of those engaged in the milk industry. Every legislature since said Act was passed has amended and strengthened it and the 1955 legislature refused to repeal or modify it."

[fol. 299] and at page 323:

> "A casual reading of the legislative findings shows that the milk industry had through devious means become a sick business, that an adequate supply of fresh, wholesome milk for the public had become imperiled and that it was necessary for the protection of the public, the consumer and producer to impose rigid restrictions and price fixing. It would be difficult to point out a more convincing case for legislative intervention. . . ."

We find from the evidence adduced at the trial that the plaintiff has failed to sustain the burden of proof that there has been an illegal application of this power of the Milk Commission upon this plaintiff. It is elementary, but perhaps worth repeating, that such power may be unlawfully applied in another instance, but in all instances the proof must be made.

---

[16] Shiver v. Lee, 89 So. 2d 318.
Borden Co. v. Odham, 121 So. 2d 625.

It is the duty of the Court to sustain police measures unless it is clearly, plainly and palpably in violation of the Constitution.[17] An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance.[18] At best plaintiff's contentions are an earnest conflict of serious opinion, and the proof offered to sustain these contentions is quite insufficient to warrant the relief sought, and judgment is accordingly entered by appropriate order for the defendant.

The foregoing is adopted by this Court as findings of fact and conclusions of law.

Dated this 26th of July, 1962.

[fol. 300]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

POLAR ICE CREAM & CREAMERY COMPANY, Plaintiff,

vs.

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida, Defendants.

JUDGMENT—July 26, 1962

In accordance with opinion and findings of fact and conclusions of law heretofore filed this day, and the Court having determined that plaintiff is not entitled to relief

---

[17] Euclid v. Ambler Realty Co., 272 U. S. 365.

[18] Erie RR Co. v. Williams, 233 U. S. 685.

sought in this litigation, it is, therefore, upon consideration, hereby

Ordered, Adjudged and Decreed:

1. That plaintiff is entitled to no relief and that all previous orders restraining the defendant, Florida Milk Commission, in this cause be and the same are dissolved.

2. The costs of this action may be taxed upon the plaintiff in accordance with the law and the rules of the United States District Court for the Northern District of Florida.

Done and Ordered this 26th day of July, 1962.

Warren L. Jones, United States Circuit Judge;
Dozier A. DeVane, United States District Judge;
G. Harrold Carswell, United States District Judge.

[fol. 302]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Tallahassee Civil Action No. 851

POLAR ICE CREAM & CREAMERY COMPANY, Plaintiff,

vs.

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 21, 1962

I. Notice is hereby given that Polar Ice Cream & Creamery Company, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the Final Judgment, entitled Order, denying relief to the

plaintiff and dissolving all previous orders restraining the defendant, Florida Milk Commission, and taxing costs upon the plaintiff, entered in this cause on the 26th day of July, 1962.

This Appeal is taken pursuant to 28 USC §1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Original Complaint of the plaintiff, together with attached exhibits;

(2) Temporary Restraining Order, dated January 9, 1962;

[fol. 303] (3) Amended Complaint, together with attached exhibits;

(4) Motion to Dismiss;

(5) Motion to Strike;

(6) Answer of the Defendants;

(7) Temporary Restraining Order, dated February 21, 1962;

(8) Pre-trial Order, dated February 21, 1962;

(9) Pleading of Plaintiff filed in compliance with Pre-trial Order;

(10) Pleading of Defendants filed in compliance with Pre-trial Order;

(11) Decision containing Findings of Fact and Conclusions of Law, dated July 26, 1962;

(12) Final Judgment, entitled Order, denying relief to the plaintiff and dissolving all previous orders restraining defendant, Florida Milk Commission, and taxing costs upon the plaintiff, entered on the 26th day of July, 1962;

(13) Transcript of the proceedings before the Three Judge Court on March 12, 1962, together with all of the testimony taken at the trial, including the opening state-

ments of court and counsel and closing arguments and closing remarks of court and counsel;

The Clerk shall also certify to the United States Supreme Court original exhibits placed in evidence at the trial, as a part of the record;

(14) Notice of Appeal to the Supreme Court of the United States.

[fol. 304] III. The following questions are presented by this appeal:

(1) Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

(2) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violate Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States.

(3) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflicts with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat. 22, 10 USC, Section 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

(4) Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment

to the Constitution of the United States in the following respects:

[fol. 305] (a) That it deprives the Plaintiff of property without due process of law.

(b) That it denies to the Plaintiff equal protection of the law.

(c) That it discriminates unreasonably, arbitrarily and oppressively against the Plaintiff.

J. A. McClain, Jr., Suite 615, Marine Bank Building, Tampa, Florida;

Jones and Harrell, Florida National Bank Building, Pensacola, Florida, By J. McHenry Jones.

Proof of Service (omitted in printing).

[fol. 308] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 309]

PLAINTIFF'S EXHIBIT No. 1

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

Contract No. DA 09-038-AIII-2032 Page 1 of 17
Order No.

Standard Form 33 (Revised June 1955)
Prescribed by General Services
Administration
Regulation 1-II-209.00

INVITATION, BID, AND AWARD
(Supply Contract)

Issued by Purchasing and Contracting Office

Address Fort Benning, Georgia

INVITATION FOR BIDS

Date Issued: 16 January 1961
Invitation No.: 09-038-61-58

Sealed bids in triplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions (Standard Form 32,

Oct 57 edition), which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 10:00 o'clock A.m., EST Time, 7 Feb. 1961 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delivery f.o.b. Destination

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

SCHEDULE

INVITATION FOR: Dairy Products, to be delivered to Fort Benning, Georgia.

PROCUREMENT AUTHORITY: Title 10, U.S.C., Section 2304(a).

CONTENTS: Invitation, Bid and Award, Pages 1 thru 17; General Provisions, Pages 1 thru 14.

BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001.

All or None Basis

Bid Date of Bid Feby 6th 1961

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within ..... calendar days (60 calendar days unless a different period be inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

..... percent, 10 calendar days; ..... percent, 20 calendar days; ..... percent, 30 calendar days.

BIDDER REPRESENTS: (Check appropriate boxes)

(1) That the aggregate number of employees of the bidder and its affiliates is ( ) 500 or more, (X) less than 500.

(2) That he is a (X) regular dealer in, (X) manufacturer of, the supplies bid upon.

(3) (a) That he ( ) has, (X) has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ( ) has, (X) has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Part 150.)

(4) He operates as an ( ) individual, ( ) partnership, (X) corporation, incorporated in the State of Fla.

Name and address of Bidder (Street, city, zone, and State. Type or print)

Polar Ice Cream & Creamery Co.
PO Box 586 639 W. Gregory St.
Pensacola, Fla.

Signature of person authorized to sign bid

/s/ J. F. W. ZIRKELBACH, Pres.

Award Date of Award 14 March 1961

Accepted as to items numbered Section II, Part I, Items 1 thru 18

Amount Estimated $1,491,110.80

Submit invoice for payment to
Finance and Accounting Office
Fort Benning, Georgia

Payment will be made by
Finance and Accounting Office
Fort Benning, Georgia

United States of America

By /s/ JACK H. BLALOCK
JACK H, BLALOCK
Contracting Officer.

Accounting and Appropriation Data

REQUIREMENTS CONTRACT: Funds and accounting and appropriation data will be cited on each order issued hereunder.

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

[fol. 310]

TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

1. PREPARATION OF BIDS.—(a) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder's risk.

(b) Each bidder shall furnish the information required by the bid form. The bidder shall print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent must be accompanied by evidence of his authority.

(c) Unit price for each unit bid on shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item bid on. In case of error in extension of price, the unit price will govern.

(d) Alternate bids will not be considered unless authorized by the Invitation.

(e) When not otherwise specified, bidder must definitely state time of proposed delivery.

(f) Time, if stated as a number of days, will include Sundays and holidays.

2. SUBMISSION OF BIDS.—(a) Bids and modifications thereof shall be enclosed in sealed envelopes addressed to the issuing office, with the name and address of the bidder,

the date and hour of opening, and the invitation number on the face of the envelope. Telegraphic bids will not be considered unless authorized by the Invitation; however, bids may be modified by telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

(b) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at bidder's request and expense, unless otherwise specified by the Invitation.

(c) In the event no bid is to be submitted, do not return the Invitation unless otherwise specified. However, a letter or post card should be sent to the issuing office advising whether future Invitations for the type of supplies or services covered by this Invitation are desired.

3. WITHDRAWAL OF BIDS.—Bids may be withdrawn by written or telegraphic notice (see 4 below).

4. LATE BIDS.—Bids and modifications or withdrawals thereof received after the time set for opening will not be considered, unless they are received before the award is made, and it is determined by the Government that failure to arrive on time was due solely to delay in the mails for which the bidder was not responsible.

5. GOVERNMENT-FURNISHED PROPERTY.—No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the Invitation.

6. LABOR INFORMATION.—Attention is invited to the possibility that wage determinations may have been made under the Walsh-Healey Public Contracts Act providing minimum wages for employees engaged in the manufacture for sale to the Government of the supplies covered by this Invitation for Bids. Information in this connection, as well as general information as to the requirements of the Act concerning overtime payment, child labor, safety and health provisions, etc., may be obtained from the Wage and Hour and Public Contracts Divisions, Department of

Labor, Washington 25, D. C. Requests for information should state the Invitation number, the issuing agency and the supplies covered.

7. DISCOUNTS.—(a) Prompt-payment discounts will be included in the evaluation of bids, provided the period of the offered discount is sufficient to permit payment within such period in the regular course of business under the delivery, inspection, and payment provisions of the Invitation and Bid.

(b) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of those points, or from date correct invoice or voucher (properly certified by the Contractor) is received in the office specified by the Government if the latter date is later than the date of delivery. Payment is deemed to be made, for the purpose of earning the discount, on the date of mailing of the Government check.

8. AWARD OF CONTRACT.—(a) The contract will be awarded to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to the Government, price and other factors considered.

(b) The Government reserves the right to reject any or all bids and to waive informalities and minor irregularities in bids received.

(c) The Government may accept any item or group of items of any bid, unless the bidder qualifies his bid by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, BIDS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY BID UPON AT THE UNIT PRICES OFFERED UNLESS THE BIDDER SPECIFIES OTHERWISE IN HIS BID.

(d) A written award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid results in a binding contract without further action by either party.

9. SELLER'S INVOICES.—Invoices shall be prepared and submitted in quadruplicate unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals: Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading. The following certificate, signed by the Contractor or his authorized representative, will be shown on the original of the invoice:

"I certify that the above bill is correct and just and that payment therefor has not been received."

When the invoice is signed in the name of a company or corporation, the name of the person signing and the capacity in which he signs must appear. For example: "John Doe Company, by John Smith, Secretary," "Treasurer," or as the case may be.

[fol. 311]

AMENDMENT TO INVITATION FOR BIDS

Page 1 of 2

Amendment No. 1

Date Amendment Issued 23 January 1961

Issuing Office
Purchasing and Contracting Office
Fort Benning, Georgia

IFB No. IFB 09-038-61-58

Date IFB Issued 16 January 1961

Date and Hour of Opening
7 February 1961, 10:00 A.M., EST.

Item (Purchase Authorization Sub 30

The above IFB is amended as follows (All Other Terms and Conditions Remain Unchanged):

a. The date of Mil. Spec. MIL-M-3801 as shown on Page No. 5 of the Schedule is changed from "20 May 1952" to "3 September 1952."

b. The following clauses are added to the Special Provisions:

"21. ADDED WATER CONTENT—PRICE DEDUCTION: a. Added water content is defined as water which has been inadvertently or by design added to milk. The milk delivered under terms of this contract shall contain no added water (See Par 3.31, Federal Specification C-M-381g, dated 19 September 1960.) The cryoscopic test as set forth in the edition of the Official Methods of Analysis of the Association of Official Agricultural Chemist, in effect on the date of invitation for bids, will be used in testing the milk for added water content. Test shall be made by or at the direction of the Government from samples drawn from deliveries made under this contract. Contractor agrees that when

(Cont'd on page 2)

The Bid Opening Date (XX) is not extended; ( ) is extended until ..... o'clock .....M., ... Time .....Date

NOTICE TO BIDDERS

Bidders must acknowledge receipt of this Amendment prior to the hour and date set for bid opening, by one of the following methods:

a. By signing and returning 3 copies of this Amendment.

b. By a notation acknowledging receipt of this Amendment on each copy of the bid submitted.

c. By separate letter or telegram which includes a reference to the IFB Number and Amendment Number.

Failure of your acknowledgment to be received at the issuing office prior to the hour and date fixed for opening of bids may result in the rejection of your bid. If, by

virtue of this Amendment, it is desired to modify a bid already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Amendment and is received prior to the opening hour and date specified above.

Full Name of Bidder (Type or Print)
Polar Ice Cream & Creamery Co.

Address 639 W. Gregory St.
Pensacola, Fla.

Signature of person authorized to sign
/s/ J. F. W. ZIRKELBACH, Pres.

[fol. 312]
AMENDMENT NO. 1 IFB 09-038-61-58 Page 2

CONTINUATION SHEET:

the analysis from three (3) or more samples drawn from three (3) or more separate fresh fluid milk deliveries during a calendar month reveal the presence of added water, all milk delivered during such month will be deemed to have contained an added water content in the amount of the average of the three (3) or more analyses. The amount of the average shall be called "excess average". All milk delivered during such month shall be deemed "excess water content milk". The gross payment due the contractor for milk for such month will be reduced by the amount obtained by multiplying such gross payment by two times the excess average for that month. For example, if the analysis indicates that the average added water content for a calendar month is 1%, the "excess average" would be 1% and the Government would be entitled to a 2% (2x1) deduction from the gross cost of milk for the month involved.

b. The above is an agreed formula for adjustment of prices of rejectable products which are accepted under the inspection clause of this contract and is without prejudice to the Government's right to terminate for default or to pursue any other remedy under this contract or provided by law."

"22. RECORDS OF INSPECTIONS: Records of inspection by the Contractor as required by General Provisions, Paragraph No. 5, shall be kept complete and available to the Government for a period of not less than ninety (90) days after expiration of this contract."

[fol. 313]

AMENDMENT TO INVITATION FOR BIDS

Page 1 of 1

Amendment No. 2

Date Amendment Issued 24 January 1961

Issuing Office
Purchasing and Contracting Office
Fort Benning, Georgia

IFB No. 09-038-61-58

Date IFB Issued 16 January 1961

Date and Hour of Opening
7 February 1961, 10:00 A.M., EST

Item Purchase Authorization Sub 30

The above IFB is amended as follows (All Other Terms and Conditions Remain Unchanged):

Paragraph 12 of the Special Provisions entitled "Inspection and Acceptance of Bulk Milk" is deleted in its entirety and the following paragraph is substituted in lieu therefor:

12. INSPECTION AND ACCEPTANCE OF BULK MILK: The average tare weight of cans, lids, tubes, and seals, as a complete unit, will be determined by the contractor prior to the beginning of any milk contract. This tare weight will be furnished the inspector by the contractor as a certification on the shipping document, a copy of which will be supplied the inspector. The verification of contractors' tare weight will be the responsibility of the inspector. In the event the contractor utilizes cans of different weights (different manufacturer or reworked) in a single delivery, it will be his responsibility to furnish the inspector average unit tare weight for each group, identifying features of each group, and certification of

different group tares. In determining the net weight, milk will be considered to weigh 8.6 pounds per gallon.

The Bid Opening Date (X) is not extended; ( ) is extended until ..... o'clock .....M., ... Time ..... Date.

NOTICE TO BIDDERS

Bidders must acknowledge receipt of this Amendment prior to the hour and date set for bid opening, by one of the following methods:

a. By signing and returning 3 copies of this Amendment.

b. By a notation acknowledging receipt of this Amendment on each copy of the bid submitted.

c. By separate letter or telegram which includes a reference to the IFB Number and Amendment Number.

Failure of your acknowledgment to be received at the issuing office prior to the hour and date fixed for opening of bids may result in the rejection of your bid. If, by virtue of this Amendment, it is desired to modify a bid already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Amendment and is received prior to the opening hour and date specified above.

Full Name of Bidder (Type or Print)
Polar Ice Cream & Creamery Co.

Address
PO Box 586 639 W. Gregory St.
Pensacola, Fla.

Signature of person authorized to sign
/s/ J. F. W. ZIRKELBACH, Pres.

[fol. 314]

CONTINUATION SHEET IFB 09-038-61-58 Page 3

TERMS AND CONDITIONS OF THE INVITATION FOR BIDS, cont'd:

11. AWARD BASED ON DELIVERY TIME: Except as otherwise stated in the Invitation for Bids it shall be understood that the bidder proposes to deliver from stocks on hand or available to the bidder in time to permit delivery within the specified time. For any supplies delivered after the specified time and accepted the price payable to the contractor, if higher than that at which award would have been made if time of delivery had not been a factor shall be such lower price irrespective of whether or not the delay is excusable under Article II (Default) of the General Provisions.

12. LATE BIDS AND MODIFICATIONS OR WITHDRAWALS: (Paragraphs 3 and 4 of the Terms and Conditions of the Invitation for Bids are deleted and this paragraph is substituted in lieu thereof.)

"Bids and modifications or withdrawals thereof received at the office designated in the Invitation for Bids after the exact time set for opening of the bids will not be considered unless they are received before award is made and (i) are submitted by mail (or by telegraph if authorized), and (ii) it is determined by the Government that late receipt was due solely to either (A) delay in the mails (or by telegraph company if telegraphic bids are authorized) for which the bidder was not responsible or (B) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted." (Apr. 1960).

13. INCONSISTENCY BETWEEN INVITATION PROVISIONS: In the event of an inconsistency between provisions of this Invitation for Bids, the inconsistency shall be resolved by giving precedence in the following order: (1) the Schedule; (2) Terms and Conditions of the Invita-

tion for Bids; (3) General Provisions; (4) other provisions of the contract whether incorporated by reference or otherwise; (5) the Specifications. (Apr. 1960).

14. FEDERAL TRANSPORTATION TAXES: Pending deletion of the reference to the Federal Transportation Taxes set forth in Paragraph 24(b) of the General Provisions entitled, "Federal, State and Local Taxes," this will affirm the inapplicability of the instant Federal Transportation Taxes by virtue of the repeal of such taxes by the Tax Rate Extension Act of 1958, supra.

15. PLACE OF CONTRACT PERFORMANCE: Bidders will indicate the location of the manufacturing or processing plant, factory, warehouse, or other establishment from which the supplies are to be furnished.

Polar Ice Cream	639 W. Gregory	Pensacola, Fla.
Name	Street Address	City & State

16. PARTNERSHIPS: Bids submitted by a partnership must be executed in the partnership name and enumerate the names of all partners. The bid need be signed by only one partner. The Contracting Officer may request evidence which will clearly establish the authority of the particular partner to effectively bind the partnership when such evidence has not been established.

(cont'd on Page 4)

[fol. 315]

CONTINUATION SHEET IFB 09-038-61[illegible]8 Page 4
TERMS AND CONDITIONS OF THE INVITATION FOR BIDS, cont'd:

17. BIDDER QUALIFICATIONS: a. All prospective contractors are notified that before an award is made, the Government may require the bidder to submit a statement of facts in detail as to the following:

(1) Financial data, such as balance sheets, profit and loss statements, cash forecast, financial history of the bidder and affiliated concerns.

(2) Current and past production records.

(3) Personnel records.

(4) List of tools, equipment and facilities.

(5) Statements or commitments concerning financial assistance and subcontracting arrangements.

(6) Analysis of operational control procedures.

(7) Number and dollar value of contracts completed within the past 12 months.

(8) Number and dollar value of uncompleted contracts with anticipated completion dates.

(9) Previous experience in performing similar or comparable work.

b. When required the Government reserves the right to conduct a pre-award survey.

18. BUY AMERICAN CERTIFICATE: (Oct 1959) The bidder or offeror hereby certifies that each end product, except the end products excluded below, is a domestic source end product (as defined in the contract clause entitled Buy American Act); and that components of unknown origin have been considered to have been mined, produced or manufactured outside the United States.

EXCLUDED ITEMS .....

Specific information as to articles, materials, and supplies excepted from the Buy American Act is available to prospective contractors upon request.

19. CERTIFICATE OF A CORPORATION: The Contractor, if a Corporation, will cause the following certificate to be executed under its corporate seal, provided that the same officer shall not execute both the contract and the certificate.

CERTIFICATE

I, C. P. Zirkelbach, certify that I am the Vice President, of the corporation named herein; that J. F. W. Zirkelbach, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

/s/ C. P. ZIRKELBACH
(Signature)

(Corporate Seal)

[fol: 316]

SCHEDULE

CONTINUATION SHEET IFB 09-038-61-58 Page 5

DELIVERY POINTS AS INDICATED:

Resale: Commissary Main Post, Commissary Annex #1, Custer Terrace, and Annex #2, Sand Hill.

Issue: Troop Messes, 95 to 140 in a ten (10) mile radius from Main Post.

Hospital: Martin Army Hospital, Kelly Hill.

Stokade: Main Post.

APPLICABLE SPECIFICATIONS:

MILK, whole, fresh, homogenized, pasteurized, Fed Spec C-M-381G, dtd 19 Sept 1960, Type I, No. 1, and Military Standard 175, dtd 12 April 1956 for bulk dispensing.

BUTTERMILK, fresh, cultured, Fed Spec C-B-816b, dtd 20 May 1952, type I.

CHOCOLATE MILK, Pasteurized, Mil Spec MIL-M-3801 dtd 20 May 1952 and Amend. 2, dtd 10 June 1954, type III, Class 1.

CREAM, half and half, fresh, Grade A, Fed Spec C-C-671d, dtd 10 March 1960, Type VI, No. 1, to contain not less than 11.5% butterfat.

CREAM, whipping, fresh, Grade A, Fed Spec C-C-671d dtd 10 March 1960, Type II, No. 1, to contain not less than 30% butterfat.

COTTAGE CHEESE, creamed, Fed Spec C-C-281c dtd 9 March 1960, Type II, Class A, packed and marked for domestic use in new outer containers.

ICE CREAM, assorted flavors, Fed Spec EE-I-116B dtd 29 May 1953, Type I(A), I(B), II(A), and II(B), flavors to be specified by ordering officer, and marked on each individual container.

SHERBET, Fed Spec EE-I-116B, dtd 29 May 1953, Type III.

(See opposite) ☞

SECTION II
(1 April 1961 thru 31 March 1962)

PART I: MILK AND DAIRY PRODUCTS (ALL OR NONE BASIS)

GROUP I - ITEMS FOR TROOP ISSUE

ITEM	SUPPLIES OR SERVICES	EST QUANTITY	UNIT	UNIT PRICE	EST AMOUNT
1.	Milk, bulk, in 3 or 5 gallon containers	1,180,000	gal	.58	684 400 00
2.	Milk, ½ pints for bivouac and stockade in fibre containers	3,512,000	½ pt	.045	158 040 00
3.	Buttermilk, ½ pints, in fibre containers	129,200	½ pt	.035	4 522 00
4.	Cottage cheese, 3 to 5 lb containers	86,000	lb	.18	15 480 00

GROUP II - ITEMS FOR RESALE

5.	Milk, quarts, in fibre containers	24,000	qt	.16	3 840 00
6.	Milk, ½ gallon, in fibre containers	1,904,000	½ gal	.2948	561 299 20
7.	Buttermilk, quarts, in fibre containers	38,800	qt	.10	3 880 00
8.	Buttermilk, ½ gal., in fibre containers	32,200	½ gal	.18	5 796 00
9.	Chocolate Milk, Quarts, in fibre containers	24,000	qt	.16	3 840 00
10.	Cream, whipping, ½ pints, in fibre containers	24,000	½ pt	.20	4 800 00
11.	Cream, Half and half, ½ pints, in fibre containers	10,800	½ pt	.15	1 620 00

GROUP III - ITEMS FOR HOSPITAL

12.	Milk, ½ pints, in fibre containers	716,000	½ pt	.045	32 220 00
13.	Milk, ½ gallon, in fibre containers	12,000	½ gal	.2948	3 537 60
14.	Buttermilk, ½ pts., in fibre containers	39,000	½ pt	.035	1 365 00
15.	Cream, whipping, quarts, in fibre containers	600	qt	.78	468 00
16.	Cream, half & half, quarts, in fiber containers	900	qt	.35	315 00
17.	Cottage Cheese, in 3 to 5 lb containers	600	lb	.18	108 00

[fol. 312]

(1 April 1961 thru 31 March 1962)

PART I: MILK AND DAIRY PRODUCTS (ALL OR NONE BASIS)

GROUP I - ITEMS FOR TROOP ISSUE

ITEM	SUPPLIES OR SERVICES	EST QUANTITY	UNIT	UNIT PRICE	EST AMOUNT
1.	Milk, bulk, in 3 or 5 gallon containers	1,180,000	gal	.58	684 400 00
2.	Milk, ½ pints for bivouac and stockade in fibre containers	3,512,000	½ pt	.045	158 040 00
3.	Buttermilk, ½ pints, in fibre containers	129,200	½ pt	.035	4 522 00
4.	Cottage cheese, 3 to 5 lb containers	86,000	lb	.18	15 480 00

GROUP II - ITEMS FOR RESALE

5.	Milk, quarts, in fibre containers	24,000	qt	.16	3 840 00
6.	Milk, ½ gallon, in fibre containers	1,904,000	½ gal	.2948	561 299 20
7.	Buttermilk, quarts, in fibre containers	38,800	qt	.10	3 880 00
8.	Buttermilk, ½ gal., in fibre containers	32,200	½ gal	.18	5 796 00
9.	Chocolate Milk, Quarts, in fibre containers	24,000	qt	.16	3 840 00
10.	Cream, whipping, ½ pints, in fibre containers	24,000	½ pt	.20	4 800 00
11.	Cream, Half and half, ½ pints, in fibre containers	10,800	½ pt	.15	1 620 00

GROUP III - ITEMS FOR HOSPITAL

12.	Milk, ½ pints, in fibre containers	716,000	½ pt	.045	32 220 00
13.	Milk, ½ gallon, in fibre containers	12,000	½ gal	.2948	3 537 60
14.	Buttermilk, ½ pts., in fibre containers	39,000	½ pt	.035	1 365 00
15.	Cream, whipping, quarts, in fibre containers	600	qt	.78	468 00
16.	Cream, half & half, quarts, in fiber containers	900	qt	.35	315 00
17.	Cottage Cheese, in 3 to 5 lb containers	600	lb	.18	108 00
18.	Chocolate milk, ½ pint, in fibre containers	124,000	½ pt	.045	5580 00

NAME OF BIDDER POLAR ICECREAM & CREAMERY CO PENSACOLA FLA TOTAL 1 491 118 80

[fol. 317]

209

(See opposite)

PART II: ICE CREAM AND SHERBET.

GROUP I - ITEMS FOR TROOP ISSUE

ITEM	SUPPLIES OR SERVICES	EST QUANTITY	UNIT	UNIT PRICE	EST AMOUNT
1.	Ice cream, vanilla, Type I(B), individually wrapped, sliced 32 to gal. packed 8 slices per quart, 4 quarts to container	26,000	gal		
2.	Ice Cream, flavors as follows, Type II(B), individually wrapped, sliced 32 to gal. packed 8 slices to quart, 4 quarts to container	62,000	gal		
	Pineapple - 9500 gal; Strawberry - 9500 gal Butter Pecan - 2400 gal; Cherry - 9500 gal Peppermint - 2600 gal; Peach - 9500 gal Chocolate - 9500 gal; Black Walnut - 9500 gal				
3.	Ice Cream, vanilla, Type I(B), individually wrapped, sliced 32 to gal. packed 8 slices per quart, 4 quarts per container, packed in dry ice	12,000	gal		
4.	Ice Cream, flavors as follows, Type II(B), individually wrapped, sliced 32 to gal, packed 8 slices to quart, 4 quarts to container, packed in dry ice	16,000	gal		
	Pineapple - 2000 gal; Peppermint - 2000 gal Chocolate - 2000 gal; Cherry - 2000 gal Strawberry - 2000 gal; Peach - 2000 gal Butter Pecan - 2000 gal; Black Walnut - 2000 gal				

GROUP II - ITEMS FOR RESALE

5.	Sherbet, assorted flavors, Type III, pint containers	24,000	pt		
6.	Ice Cream, vanilla, Type I(A), pint containers	6,000	pt		
7.	Ice Cream, vanilla, Type I(A), ½ gal containers	20,000	½ gal		
8.	Ice Cream, flavors as follows, Type II(A), pint containers	20,000	pt		

GROUP I - ITEMS FOR TROOP ISSUE

ITEM	SUPPLIES OR SERVICES	EST QUANTITY	UNIT	UNIT PRICE	EST AMOUNT
1.	Ice cream, vanilla, Type I(B), individually wrapped, sliced 32 to gal. packed 8 slices per quart, 4 quarts to container	26,000	gal		
2.	Ice Cream, flavors as follows, Type II(B), individually wrapped, sliced 32 to gal. packed 8 slices to quart, 4 quarts to container	62,000	gal		

Pineapple - 9500 gal
Butter Pecan - 2400 gal
Peppermint - 2600 gal
Chocolate - 9500 gal
Strawberry - 9500 gal
Cherry - 9500 gal
Peach - 9500 gal
Black Walnut - 9500 gal

3.	Ice Cream, vanilla, Type I(B), individually wrapped, sliced 32 to gal. packed 8 slices per quart, 4 quarts per container, packed in dry ice	12,000	gal		
4.	Ice Cream, flavors as follows, Type II(B), individually wrapped, sliced 32 to gal, packed 8 slices to quart, 4 quarts to container, packed in dry ice	16,000	gal		

Pineapple - 2000 gal
Chocolate - 2000 gal
Strawberry - 2000 gal
Butter Pecan - 2000 gal
Peppermint - 2000 gal
Cherry - 2000 gal
Peach - 2000 gal
Black Walnut - 2000 gal

GROUP II - ITEMS FOR RESALE

5.	Sherbet, assorted flavors, Type III, pint containers	24,000	pt		
6.	Ice Cream, vanilla, Type I(A), pint containers	6,000	pt		
7.	Ice Cream, vanilla, Type I(A), ½ gal containers	20,000	½ gal		
8.	Ice Cream, flavors as follows, Type II(A), pint containers	20,000	pt		

Chocolate - 8,000 pt
Strawberry - 8,000 pt
Butter Pecan - 4,000 pt

NAME OF BIDDER _____

[fol. 318]

(See opposite) ☞

ITEM	SUPPLIES OR SERVICES	EST QUANTITY	UNIT	UNIT PRICE	EST AMOUNT
9.	Ice Cream, flavors as follows, Type II(A), ½ gal containers Chocolate - 10,000 ½ gal Strawberry - 10,000 ½ gal	20,000	½ gal		
	GROUP III - ITEMS FOR HOSPITAL				
10.	Ice Cream, vanilla, Type I(B), individually wrapped, sliced 32 to gal. packed 8 slices per quart, 4 quarts to container	2,000	gal		
11.	Ice Cream, flavors as follows, Type II(B), individually wrapped, sliced 32 to gal, packed 8 slices per quart, 4 quarts to container Butter Pecan - 400 gal Peppermint - 200 gal Chocolate - 800 gal Strawberry - 600 gal	2,000	gal		
12.	Sherbet, lemon, lime, orange, and pineapple flavors, Type III, 2½ gal. containers	1,440	gal		

[fol. 320] SPECIAL PROVISIONS

1. DELIVERY: TIME: Deliveries shall be made within 24 hours after receipt of notification by the Commissary Officer on such days and at such hours and in such amounts as may be requested by the Commissary Officer during the contract period.

2. CONTRACT PERIOD: a. Any contract awarded under Section I shall begin 1 April 1961, or date of award if later, and shall end 30 September 1961, both dates inclusive, unless sooner terminated under the provisions of this contract.

b. Any contract awarded under Section II shall begin 1 April 1961, or date of award if later, and shall end 31 March 1962, both dates inclusive, unless sooner terminated under the provisions of this contract.

3. ORDERS: a. Prior to the beginning of each month, the contractor shall be assigned an order number. This order number shall be referred to by the Government in requesting deliveries hereunder and by the contractor in making deliveries hereunder. Order numbers at no time will be assigned to cover a period in excess of one month. *No deliveries shall be made hereunder until such an order number has been assigned.*

b. At the beginning of each month the Contracting Officer shall issue an order covering all deliveries made during the preceding month. This order shall bear the same order number as previously assigned to cover deliveries during the particular month involved.

4. DELIVERY TICKETS: At the time of delivery, the Contractor will prepare a delivery ticket in triplicate for each mess receiving the supplies and will obtain the signature of the mess officer or his representative on both the record of direct deliveries and the delivery ticket. The person signing these forms will first enter the quantity received on the record of direct delivery form. One copy of the delivery ticket will be given to the person signing it to be retained in company mess records. The original will be attached to the record of direct deliveries. Upon completion of the days deliveries, the original copy of the record of direct delivery form with the supporting delivery tickets will be

returned to the Commissary Accounts Clerk by the Contractor.

5. ESTIMATED QUANTITIES: The estimated quantities of items specified herein are based upon the best information obtainable and represent the estimated and not the actual amounts which may be required during the contract period. The fact that specific quantities cannot be determined will not relieve the Department of the Army of its obligation to order from the successful bidder all which in the judgment of the Contracting Officer, may be needed and shall not in any case relieve the successful bidder of his obligation to fill all orders which may be required during the contract period. Estimated quantities which are not ordered prior to expiration of the period specified, or termination of the Contract, will be automatically cancelled.

6. STAMP CODES: All products, with the exception of bulk milk, delivered under this contract will be stamp coded to indicate dates of pasteurization or homogenization. Copies of the code index will be furnished by the contractor to the Station Veterinarian and the Commissary Officer on or before the first delivery date. Bulk containers will be stamped to indicate the time, day and month of homogenization by means of a tag or label attached to each can.

CONTINUATION SHEET IFB 09-038-61-58 Page 13
SPECIAL PROVISIONS, cont'd:

[fol. 321] 7. SANITARY INSPECTION: a. Award of items listed on this invitation for bids shall be made only to a bidder whose facilities at which such items are to be produced have been inspected or otherwise approved by an officer of the Army Veterinary Corps within 30 days prior to the opening date of this invitation for bids. In the event that the inspection reveals the existence of unsanitary conditions based on U. S. Government health and sanitary standards, the bidder shall be informed of such conditions in writing, by the Contracting Officer prior to award, and no award shall be made to that bidder unless the conditions are immediately corrected, reinspection requested, and on such reinspection the facilities are found satisfactory and approved.

b. The Government reserves the right to inspect the Contractor's facilities and products to be supplied under this contract at all reasonable times during the performance of the contract. If the inspection reveals the existence of unsanitary conditions or failure of the products to meet specifications such as to jeopardize the health and welfare of the consumer based on U.S. Government health and sanitary standards, the Contracting Officer may cease purchasing such products under the contract immediately and procure them from other available sources. Any excess costs incurred by the Government in repurchasing said products shall be borne by the Contractor. The Contractor shall be notified in writing of such action and shall be given ten (10) days in which to correct existing deficiencies. Meanwhile, no purchase of the products shall be made from the Contractor until the deficiencies are corrected. Refusal or failure to correct such deficiencies shall constitute sufficient cause for termination of the Contract for default in accordance with clause hereof entitled "Default."

c. Bidders may obtain sanitary inspection of their facilities by applying in writing to the Contracting Officer noted herein not less than ten (10) calendar days prior to the opening date of this invitation for bids.

d. The results of any sanitary inspection by the Department of the Army will not be used for private sales promotion or advertising purposes.

8. BUTTERFAT DEFICIENCIES: a. During the life of this Contract, a Government inspector will draw samples from not less than three shipments during each monthly period for laboratory analysis. If such analysis reveals a percentage of butterfat below that specified elsewhere in this contract, the weighted averages butterfat percentage of the lots from which the samples were drawn shall be ascertained on the basis of the percentage in the samples, and all products delivered during the month shall be deemed to have contained the average percentage of butterfat so ascertained.

b. If the average butterfat content so determined is below contract requirements, the price per unit paid to the Contractor for that month shall be in the same ratio to the amount of butterfat delivered as the contract price per

unit is to the amount of butterfat required to be delivered. No payment over the contract unit price will be made for any delivery of products containing more than the required percentage of butterfat as stated in the contract.

c. The foregoing is an agreed formula for adjustment of prices of rejectable products which are accepted under the inspection clause of this Contract, and is without prejudice to the Government's right to terminate for default or to pursue any other remedy under this contract or provided by law.

CONTINUATION SHEET IFB 09-038-61-58 Page 14
SPECIAL PROVISIONS, cont'd:

[fol. 322] 9. INSTALLATION AND MAINTENANCE OF BULK MILK DISPENSERS: a. The Contractor will install the number and sizes single or multiple, milk dispensers, with military type as requested by the Commissary Officer or his authorized representative. Contractor will furnish milk containers including all necessary labor, materials, tools, equipment, and service to keep milk dispensers in good operating condition at his own expense for the duration of the contract.

b. While the Government will exercise its best efforts to care for and return multi-service containers and bulk milk dispensing equipment furnished by the Contractor, it assumes no financial responsibility for any damage thereto or breakage or loss thereof.

10. SANITARY REQUIREMENTS, BULK MILK DISPENSERS, CANS AND CAN FILLERS: a. Only pasteurized, homogenized milk may be dispensed through bulk milk dispensers.

b. The milk containers will be standard 3 or 5 gallon tinned steel or stainless steel milk cans modified as necessary to provide milk outlet. The can and cover will be washable by means of standard can scrubbers and washers.

c. The dispensing cabinet into which the cans of milk are placed must be insulated and have sufficient refrigerating capacity to maintain the milk at a temperature of 42 degrees F. or less. An automatic warning light or device, or a thermometer to warn the operator that the above temperature is being exceeded must be an integral part of the cabinet.

d. When the dispenser is in operation, no milk-contact surface, except the delivery orifice, will be exposed to manual contact, droplet infection, dust, flies, or other source of contamination.

e. All rubber or synthetic parts, such as milk delivery tubes or valves will be of single service type. They will be sterilized, applied at the dairy, protected from contamination while in transit, and then removed from the empty can and discarded at the point where the milk is dispensed.

f. No milk-contact part will remain in the dispensing cabinet. Can washings and bactericidal treatment will be at the dairy plant and consist of pre-scrubbing with a unit containing a power bursh and then washing in a unit used exclusively for cans that previously contained pasteurized milk.

g. The can filling machine will be of the type which raises the can against a filling attachment which fits tightly in the mouth of the cans thereby preventing accidental atmospheric contamination during the filling process.

h. After a can is filled and as the cover is put in place, a piece of clean, waterproof and grease resistant paper will be inserted between the can and cover, this paper will be purchased and stored only in sanitary wrappings or cartons; will be kept therein in a clean, dry place until used, and will be handled in a sanitary manner.

i. Dispenser cans, when empty shall be removed from the cabinet, as soon as practicable, the seals broken, and then promptly rinsed with water to remove residual milk films. The single service dispensing tube shall be removed and discarded before return of the dispenser can to the dairy

SPECIAL PROVISIONS, cont'd:

[fol. 323] processing plant. Dispenser cans shall not be used for other purposes before returning to the dairy. Filled dispenser cans shall be sealed at the dairy and seals shall remain intact at all times the can is in the dispenser cabinet.

j. No items other than the milk cans and their contents will be stored in the dispenser cabinets.

11. Failure of Dispensing Equipment: In the event the contractor does not furnish or repair dispensers to permit

service of bulk milk at the time required by the installation, he shall be required to furnish sufficient milk in one-half pint individual service containers at the bulk milk price set forth in the contract for the item, until necessary dispensing equipment is provided. Any loss of contents of any dispenser due to mechanical failure, other than a general power failure at the installation will be replaced immediately by the Contractor without cost to the Government.

12. INSPECTION AND ACCEPTANCE OF BULK MILK: The average tare weight of cans, lids, tubes, and seals, as a complete unit, will be determined by the contractor prior to the beginning of any milk contract. This tare weight will be furnished the inspector by the contractor as a certification on the shipping document, a copy of which will be supplied the inspector. The verification of contractors' tare weight will be the responsibility of the inspector. In the event the contractor utilizes cans of different weights (different manufacturer or reworked) in a single delivery, it will be his responsibility to furnish the inspector average unit tare weight for each group, identifying features of each group, and certification of different group tares. In determining the net weight, milk will be considered to weigh 8.6 pounds per gallon. The Post Veterinarian shall, in the presence of the contractor's representative weigh a minimum of 5% of the cans representing any one days delivery determining the net weight of the contents. This shall be accomplished at the time and place stipulated by the Post Veterinarian but not less than three times per month. At the end of each month, an average of the total net weight of contents shall be taken and this average shall be considered to represent the net weight of contents in each can delivered during the month. The net weight of contents shall be converted into gallons and multiplied by the total number of cans received during the month, the sum of which shall represent the total number of gallons received during the month.

13. PACKING: a. Sections I and II; Part I, Items 1 thru 18; and Part II, Items 1, 2, 5 thru 12 require standard commercial packing and refrigeration necessary to protect the

products for delivery direct to unit mess, Commissary Store, and/or hospital freezers.

b. Sections I and II, Part II, Items 3 and 4, require a special dry ice packing that will protect the product a minimum of 4 hours when issued to messes for consumption in field problems. These items will be packed 4 quarts to each dry ice container. Contractor will be notified by the Commissary Officer as to the days and quantities this special packaging will be required.

14. INSPECTION AND ACCEPTANCE: Inspection and acceptance will be accomplished at destination by an authorized representative of the Commissary Officer.

CONTINUATION SHEET IFB 09-038-61-58 Page 16
SPECIAL PROVISIONS, cont'd:

[fol. 324] 15. FEDERAL FOOD, DRUG, AND COSMETIC ACT: Deliveries to conform to provisions of the Federal Food, Drug, and Cosmetic Act. (Public Law No. 717—75th Congress.)

16. INVOICES: Invoices will be prepared in accordance with Paragraph 9, page 2, of the contract, on the first of each month covering deliveries made the preceding month, and submitted to Finance and Accounting Office, Fort Benning, Georgia.

17. AWARD: a. In conjunction with Paragraph 8 of the "Terms and Conditions of the Invitation for Bids," the low bid will be determined by multiplying the unit price by the estimated quantity.

b. This method of computation is intended in no way to diminish the force or effect of any provision of the Invitation for Bids or prevent the Government from making awards to the lowest responsive bidders in the best interest of the Government.

c. In addition to other factors, bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making multiple awards. For the purpose of making this evaluation, it will be assumed that the sum of $50.00 would be the administrative cost to the Government for issuing and administering each contract awarded under this invitation, and individual

awards will be for the items or combination of items which result in the lowest aggregate price to the Government, including such administrative costs.

d. Award will be made for 6 or 12 months, whichever will be most advantageous to the Government, price and other factors considered.

18. SUBJECT TO AVAILABILITY OF FUNDS: The placing of orders against this contract is contingent upon funds being made available for this purpose.

19. DELIVERY VEHICLES AND CONVEYANCES: Products shall be properly iced and/or refrigerated and only clean, closed vehicles conforming to best standards of commercial transportation for the products to be delivered, equipped and maintained in a sanitary condition to protect against contamination of the product, shall be used. Products tendered for acceptance in insanitary vehicles or conveyances will be rejected without further inspection.

20. DEVIATION FROM SPECIFICATIONS:

a. *Federal Specification EE-I-116b, Ice Cream; Sherbets and Ices.*

(1) Page 1, paragraph 1.1.1. Delete.

(2) Page 5, paragraph 7.2.1. Change title of Mil-Std-129 to "Marking for shipment and Storage".

(3) Page 5, Paragraph 7.2.4. Delete and substitute; "7.2.4. Ordering data. In addition to the information specified in 6.1, procurement documents should specify type of container required if other than that specified in 7.2.2(a), through (f), and should specify class of product desired (see 7.2.7)".

(4) Add new paragraph "7.2.7 *Net weights (per gallon basis) on finished cream (Type I and Type II product).*

When designated by the requisitioning agency (see paragraph 7.2.4) finished product shall meet the minimum weight requirements as stated by class designation in table below:"

CONTINUATION SHEET IFB 09-038-61-58 Page 17
SPECIAL PROVISIONS, cont'd:

[fol. 325]

Class	*Weight per gallon (lbs)*	*Food solids per gallon (lbs)*
1	4.5	1.6
2	4.9	1.7
3	5.1	1.8
4	5.4	1.9

* Where no class requirement is designated, class 1 shall be procured."

b. Federal Specification C-C-671d, Cream, and Half-and-Half, Fresh.

Inspection shall be as set forth in Federal Specification C-C-671d, 10 Mar 60, except Par. 4.4 does not apply and acceptance inspection shall be performed by the Government.

c. Federal Specification C-M-381, Milk, Whole, Fresh; Military Specification MIL-M-3801, Milk, Pasteurized, Chocolate, and Chocolate Drink, Pasteurized; Federal Specification C-B-816, Buttermilk;

(1) Any references, either under "Applicable Specifications" or otherwise, to Federal Specification NN-B-631, Boxes; Wood, Wirebound (For Domestic Shipment) are superseded by Federal Specification PPP-B-585, Boxes; Wood, Wirebound.

(2) Any references, either under "Applicable Specifications" or otherwise, to Federal Specification LLL-B-631, Boxes; Fiber, Corrugated (For domestic shipment), and/or LLL-B-636, Boxes; Fiber, Solid (For Domestic Shipment) are superseded by Federal Specification PPP-B-636, Boxes, Fiber.

d. Federal Specification C-C-281c, Cheese, Cottage. Inspection shall be as set forth in Federal Specification C-C-281c, except paragraph 4.4 does not apply, and acceptance inspection shall be performed by the Government.

Standard Form 32, Oct. 1947 Edition
Prescribed by General Services
Administration Regulation 1-11.209 (c)

GENERAL PROVISIONS

(Supply Contract)

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

5. INSPECTION

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in this contract: *Provided,* That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated

[fol. 326]

PLAINTIFF'S EXH

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

3. EXTRAS

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

4. VARIATION IN QUANTITY

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

5. INSPECTION

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in this contract: *Provided,* That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this

[fol. 326]

PLAINTIFF'S EXHIBIT NO. 1

contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

6. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

7. PAYMENTS

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. (*The preceding sentence applies only if this contract is with the Department of D*

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same: *Provided*, That a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

9. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

10. EXAMINATION OF RECORDS

(The following clause is applicable if the amount of this contract exceeds $1,000 and was entered into by means of negotiation, but is not applicable if this contract was entered into by means of formal advertising.)

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting O

[Fol. 357]

such longer period as may be specified elsewhere in this contract.

6. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

7. PAYMENTS

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. *(The preceding sentence applies only if this contract is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President pursuant to clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)*

assignee upon the prior written authorization of the Contracting Officer.

9. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

10. EXAMINATION OF RECORDS

(The following clause is applicable if the amount of this contract exceeds $1,000 and was entered into by means of negotiation, but is not applicable if this contract was entered into by means of formal advertising.)

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(b) The Contractor agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem

Void

[fol. 327]

appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(*c*) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(*d*) If this contract is terminated as provided in paragraph (*a*) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(*e*) If, after notice of termination of this contract under the provisions of paragraph (*a*) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (*c*) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed tion to any other rights and remedies provided by law or under this contract.

12. DISPUTES

(*a*) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(*b*) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (*a*) above: *Provided*, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

13. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this contract exceeds $5,000.

(*a*) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(*b*) In the event of litigation against the Government on account of any claim of patent infringement arising out of the performance of this contract or out of the use of any supplies furnished or work done or service performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such litigation. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

14. BUY AMERICAN ACT

(*a*) In acquiring end products, the Buy American Act (41 U. S. Code 10 a–d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

VOID

[fol. 328]

ment for any excess costs for such similar supplies or services: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(*c*) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(*d*) If this contract is terminated as provided in paragraph (*a*) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(*e*) If, after notice of termination of this contract under the provisions of paragraph (*a*) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (*c*) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (*Except as otherwise provided in this contract, this paragraph (e) applies only if this contract contains such clause.*)

(*f*) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addi-

12. DISPUTES

(*a*) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(*b*) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (*a*) above: *Provided*, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

13. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this contract exceeds $5,000.

(*a*) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(*b*) In the event of litigation against the Government on account of any claim of patent infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or service performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such litigation. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

14. BUY AMERICAN ACT

(*a*) In acquiring end products, the Buy American Act (41 U. S. Code 10 a–d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies which are to be acquired under this contract for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or

VOID

[fol. 328]

produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of this (*a*) (iii) (B), components of foreign origin of the same type or kind as the products referred to in (*b*) (ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(*b*) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products

(i) which are for [illegible] United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

15. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

16. EIGHT-HOUR LAW OF 1912—OVERTIME COMPENSATION

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912, as amended (40 U. S. Code 324–326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35–45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912, as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day, and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

17. WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U. S. Code 35–45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

18. NONDISCRIMINATION IN EMPLOYMENT

(*a*) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(*b*) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

19. OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

20. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

21. UTILIZATION OF SMALL BUSINESS CONCERNS

(*a*) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(*b*) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

U. S. GOVERNMENT PRINTING OFFICE : 1957 O - 442851

[fol. 330] 22. EXAMINATION OF RECORDS (JAN. 1959) (ASPR 7-104.15) (The following clause is applicable if the amount of this contract exceeds $2,500.00 and was entered into by means of negotiation, but is not applicable if this contract was entered into by means of formal advertising).

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $2,500.00 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

23. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT (Oct. 1958) (ASPR 9-104): The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.00.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any suit against the Government, or any claim against the Government, made before suit has been instituted, on account of any alleged patent infringement arising out of the performance of this contract or

out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

24. FEDERAL, STATE, AND LOCAL TAXES (JAN. 1958) (ASPR 11-401.1): (a) As used throughout this clause, the term "tax inclusive date" means the date of negotiated contracts and the date set for the opening of bids for contracts entered into through formal advertising. As to additional supplies or services procured by modification to this contract, the term "tax inclusive date" means the date of such modification.

(b) Except as may be otherwise provided in this contract, the contract price includes all Federal, State and Local Taxes and duties in effect and applicable to this contract on the tax inclusive date, except taxes (other than Federal Transportation Taxes) from which the Government, the Contractor, or the transactions or property covered by this contract are then exempt. Unless specifically excluded, duties are included in the contract price, and, if freight is included in the contract price, Federal Transportation Taxes are likewise included.

[fol. 331] (c) (1) If the Contractor is required to pay or bear the burden (i) of any tax or duty which either was not to be included in the contract price pursuant to the requirements of paragraph (b), or was specifically excluded from the contract price by a provision of this contract; or (ii) of any increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price; or of any interest or penalty thereon, the contract price shall be correspondingly increased; provided that the Contractor warrants in writing that no amount for such tax, duty, or rate increase was included in the contract price as a contingency reserve or otherwise; and provided further that liability for such tax,

duty, rate increase, interest, or penalty was not incurred through the fault or negligence of the Contract or his failure to follow instructions of the Contracting Officer.

(2) If the Contractor is not required to pay or bear the burden, or obtain a refund or drawback, in whole or in part, of any tax, duty, interest, or penalty which (i) was to be included in the contract price pursuant to the requirements of paragraph (b), (ii) was included in the contract price; or (iii) was the basis of an increase in the contract price, the contract price shall be correspondingly decreased or the amount of such relief, refund, or drawback shall be paid to the Government, as directed by the Contracting Officer. The contract price also shall be correspondingly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden, or does not obtain a refund or drawback of any such tax, duty, interest, or penalty. Interest paid or credited to the Contractor incident to a refund of taxes shall inure to the benefit of the Government to the extent that such interest was earned after the Contractor was paid or reimbursed by the Government for such taxes.

(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this paragraph (c) shall set forth the amount thereof as a separate item and shall identify the particular tax involved.

(4) Nothing in this paragraph (c) shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes; Federal Transportation Taxes, except changes in the rate thereof, including repeal, pertaining to shipments from the Contractor to the Government; unemployment compensation taxes; or any State and local taxes, except those levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract including gross income taxes, gross receipts taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipts from sales.

(5) No adjustment of less than $100.00 shall be made in the contract price pursuant to this paragraph.

(d) Unless there does not exist any reasonable basis to sustain an exemption, the Government agrees upon request of the Contractor, without further liability except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from (i) any Federal tax, which the Contractor warrants in writing was excluded from the contract price, or (ii) any State or local tax; provided that evidence appropriate to establish exemption from duties will be furnished and Government bills of lading will be issued, only at the discretion of the Contracting Officer. In addition, the Contracting Officer may furnish evidence appropriate to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract clause.

[fol. 332] (e) (1) The Contractor shall promptly notify the Contracting Officer of all matters pertaining to Federal, State and local taxes and duties that reasonably may result in either an increase or decrease in the contract price.

(2) Whenever an increase or decrease in the contract price may be required under this clause, the Contractor shall take action as directed by the Contracting Officer, and the contract price shall be equitably adjusted to cover fees.

(f) The prices in this contract do not include any amount to pay taxes imposed under the Georgia Retail and Consumers Sales and Use Tax Act upon the retail sale of personal property to the Government.

25. Renegotiation (Oct. 1959) (ASPR 7-103-13): (a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211 et seq), as amended, and to any subsequent act of Congress providing for the renegotiation of contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amended specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in section 103g of the Renegotiation Act of 1951, as amended.

26. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (OCT. 1959) (ASPR 8-701): (a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

(ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer,

to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

[fol. 333] (vi) transfer title and deliver to the Government, in the manner at the time, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which if the contract had been completed, would have been required to be furnished to the Government;

(vii) use its best efforts to sell, in the manner, at the time, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; provided, however that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;

(viii) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the

Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Office, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action he may receive and act upon any such termination claim at any time after such one year period or extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regu- [fol. 334] lation in effect as of the date of execution of

this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer, shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(i) for completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b) (vii) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(ii) the total of—

(A) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e) (i) hereof;

(B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(v) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (A) above, and

(C) a sum, as a profit, equal to 2 percent of that part of the amount determined under (A) above which represents the cost of articles and materials not processed by the Contractor plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above, which amount for purpose of this subdivision (C) shall exclude any charges for interest on borrowing; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(iii) the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement of claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of [fol. 335] subcontracts thereunder, together with reasonable storage, transportation, and other cost incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (i) and (ii) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in (e) (i) and (ii)(A) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(vii).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in paragraph 8-302 of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes", from any determination made by the Contracting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of

sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract, (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the [fol. 336] Contractor to the date on which such excess is repaid to the Government; provided however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the Office of the Contractor but without direct charge

to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

27. AUTHORIZATION AND CONSENT (JAN. 1955) (ASPR 9-102.1): The Government hereby gives its authorization and consent (without prejudice to its rights of indemnification if such rights are provided for in this contract) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any patented invention (i) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner or performance. The Contractor's entire liability to the Government for patent infringement shall be determined solely by the provisions of the indemnity clause, if any, included in the contract and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

28. PATENT INDEMNITY (PREDETERMINED) (JAN. 1955) (ASPR 9-103.1): If the amount of this contract is in excess of $5,000.00 the Contractor shall indemnify the Government and its officers, agents and employees against liability, including costs, for infringement of any United States Letters patent (except letters patent issued upon application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or

repair of real property (hereinafter referred to as "construction work") under this contract or out of the use or disposal by or for the account of the Government of such supplies or construction work. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof, and further, such indemnity shall not apply if (i) the infringement results from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of per- [fol. 337] formance of the contract not normally used by the Contractor; or (ii) the infringement results from the addition to, or change in, the supplies furnished or construction work performed, which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) the claimed infringement is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

29. Preference for Certain Domestic Commodities (Mar. 1958) (ASPR 6-305): The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico; provided that this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices; provided further, that nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed in the United States, its possessions or Puerto Rico.

30. GRATUITIES (MAR. 1952) (ASPR 7-104.16): (a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative that gratuities (in the form of entertainments, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof; the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

31. PRIORITIES, ALLOCATIONS AND ALLOTMENTS (JAN. 1955) (ASPR 7-104.18): The Contractor agrees, in the procurement and use of materials required for the performance of this contract, to comply with the provisions of all applicable rules and regulations of the Business and Defense Services Administration, including Defense Materials System regulations.

32. NOTICE TO THE GOVERNMENT OF LABOR DISPUTES (SEP. 1958) (ASPR 7-104.4): (a) Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

[fol. 338] (b) The Contractor, agrees to insert the substance of this clause, including this paragraph (b), in any subcontract hereunder as to which a labor dispute may delay the timely performance of this contract; except that each such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify his next higher tier subcontractor, or the prime contractor, as the case may be, of all relevant information with respect to such dispute.

33. UTILIZATION OF CONCERNS IN LABOR SURPLUS AREAS (OCT. 1960) (ASPR 7-104.20): It is the policy of the Government to place supply contract with suppliers who will perform such contracts substantially in areas of persistent or substantial labor surplus where this can be done, consistent with the efficient performance of the contract, at prices no higher than are obtainable elsewhere. The Contractor agrees to use his best efforts to place his subcontracts in accordance with this policy. In complying with the foregoing and with paragraph (b) of the clause of this contract entitled "Utilization of Small Business Concerns," the Contractor in placing his subcontracts shall observe the following order of preference; (i) persistent labor surplus area concerns which are also small business concerns; (ii) other persistent labor surplus area concerns; (iii) substantial labor surplus area concerns which are also small business concerns; (iv) other substantial labor surplus area concerns; and (v) small business concerns which are not labor surplus area concerns.

34. BUY AMERICAN ACT (JUL. 1960) (ASPR 6-104.5): (a) In acquiring end products the Buy American Act (41 U.S.C.

10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause: (i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products; (ii) "end products" means those articles, materials, and supplies which are to be acquired under this contract for public use; and (iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a) (iii) (B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products: (i) which are for use outside the United States; (ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality; (iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or (iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

[fol. 339] 35. CLAIMS LIABILITY ARTICLE: The Contractor agrees to save the Government harmless from any and all claims, demands, actions, debts, liabilities, judgements, costs and attorneys fees arising out of, claimed or account of, or in any manner predicated upon loss of or damage to property of and injuries contributed to by contractor, his

agents, servants, or employees, while in, upon, or about the military reservation on which the work under this contract is to be done, or while going to or departing from the same, and to save the Government harmless from and on account of damages of any kind which Government may suffer as the result of the acts of any of the contractors, agents, servants, or employees in or about said military reservation.

36. ALTERATIONS IN CONTRACT: The following alterations have been made in the provisions of this contract:

(a) Paragraph 10 of the General Provisions entitled "Examination of Records", is hereby deleted and paragraph 22 bearing the same title is substituted in lieu thereof.

(b) Paragraph 13 of the General Provisions entitled "Notice and Assistance Regarding Patent Infringement", is hereby deleted and Paragraph 23 bearing the same title is substituted in lieu thereof.

(c) Paragraph 14 of the General Provisions entitled "Buy American Act", is hereby deleted and Paragraph 34 bearing the same title is substituted in lieu thereof.

[fol. 340]

U. S. NAVY MINE DEFENSE LABORATORY

PANAMA CITY, FLORIDA

IN REPLY REFER TO:
Code 413C
Serial 246
22 June 1961

Polar Ice Cream Creamery Co.
639 W. Gregory Street
Pensacola, Florida

Gentlemen:

Contract No. N61331s-1092 has been awarded to your Company under the terms specified therein. A copy of the Award is enclosed.

Very truly yours,

/s/ M. R. HALE
FOR
K. D. STRICKLER
CDR SC USN
Supply Officer

Encl:
(1) Award No. N61331s-1092

[fol. 341]

Code 413C
Serial 246
22 June 1961

Polar Ice Cream Creamery Co.
639 W. Gregory Street
Pensacola, Florida

Gentlemen:

Contract No. N61331s-1092 has been awarded to your Company under the terms specified therein. A copy of the Award is enclosed.

Very truly yours,

K. D. STRICKLER
CDR SC USN
Supply Officer

Encl:
(1) Award No. N61331s-1092

APPROVAL OF CONTRACT

CONTRACTOR

Polar Ice Cream & Creamery Co.
PO Box 586, 639 W. Gregory
Pensacola, Florida

CONTRACT NUMBER

AF 08(637)-1169

APPROVED: 2 JUN 1961

Willis A Becker
WILLIS A. BECKER
Acting Director of Procurement
and Production
Air Defense Command

[fol. 342]

In United States District Court
Northern District of Florida
Tallahassee Division

Plaintiff's Exhibit 2

243

TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

SMALL BUSINESS RESTRICTED ADVERTISING

Standard Form 33 (Oct. 1957 Edition) Prescribed by General Services Administration Regulation 1—II—000.00 RC

INVITATION, BID, AND AWARD
(SUPPLY CONTRACT)

CONTRACT NO. AF 08(637)-1169
ORDER NO. (If any) Class-0910

PAGE 1 NUMBER OF PAGES 9

ISSUED BY 61-C-9060 Base Procurement Office

ADDRESS Tyndall AFB, Florida

INVITATION FOR BIDS

DATE ISSUED 14 April 1961 INVITATION NO. 08-637-61-105

Sealed bids in TRIPLICATE subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions [illegible], which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 1:00 o'clock P.m., CST Time, 15 May 1961 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delivery f. o. b. Destination

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

SCHEDULE

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (No. of units)	UNIT	UNIT PRICE	AMOUNT
	See Continuation Sheets Numbered 3 thru 9 Contract Authority 10 U.S.C. 2304 (a) (1) All or None Basis Procurement of Dairy Products for Troop Issue - 1 Jul 61 thru 31 Dec 61 Purchase Request No. ABSO-B Ltr dtd 12 Apr 61				May 12, 1961

BID

DATE OF BID

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within _____ calendar days (60 calendar days unless a different period be inserted by the bidder) from the date for opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

_____ percent, 10 calendar days; _____ percent, 20 calendar days; _____ percent, 30 calendar days.

BIDDER REPRESENTS: (Check appropriate boxes)

(1) That he ☒ is, ☐ is not, a small business concern. (See definition on reverse hereof.) If bidder is a small business concern and is not the manufacturer of the supplies bid upon, he also represents that all supplies to be furnished hereunder ☐ will, ☐ will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a ☐ regular dealer in, ☐ manufacturer of, the supplies bid upon.

(3) (a) That he ☐ has, ☒ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☒ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Part 150.)

(4) He operates as an ☐ individual, ☐ partnership, ☒ corporation, incorporated in the State of Fla

NAME AND ADDRESS OF BIDDER (Street, city, zone, state) (Type or print)
Palmdale Cream Products Co.
P.O. Box 786 635 W Bayou Dr
Pensacola Fla

SIGNATURE OF PERSON AUTHORIZED TO SIGN BID
[signature] 12 May 1961

TYPE OR PRINT SIGNER'S NAME AND TITLE
Pres

AWARD

DATE OF AWARD MAY 25 1961

ACCEPTED AS TO ITEMS NUMBERED 1 thru 5

AMOUNT $ 68,975.00

UNITED STATES OF AMERICA
BY Ruby C. Vassas 27 May 1961
RUBY C. VASSAS Contracting Officer

SUBMIT INVOICE FOR PAYMENT TO
Accounting & Finance Officer
Tyndall AFB, Florida

ACCOUNTING AND APPROPRIATION DATA Funds are not obligated by this instrument. All calls or delivery orders placed against this contract will contain a certification of availability of funds together with a citation of the proper allotment account to be charged in making payment.

PAYMENT WILL BE MADE BY
Accounting & Finance Officer
Tyndall AFB, Florida

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

18—60683-4

244

[fol. 343]

TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

1. PREPARATION OF BIDS.—(*a*) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder's risk.

(*b*) Each bidder shall furnish the information required by the bid form. The bidder shall print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent must be accompanied by evidence of his authority.

(*c*) Unit price for each unit bid on shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item bid on. In case of error in extension of price, the unit price will govern.

(*d*) Alternate bids will not be considered unless authorized by the Invitation.

(*e*) When not otherwise specified, bidder must definitely state time of proposed delivery.

(*f*) Time, if stated as a number of days, will include Sundays and holidays.

2. SUBMISSION OF BIDS.—(*a*) Bids and modifications thereof shall be enclosed in sealed envelopes addressed to the issuing office, with the name and address of the bidder, the date and hour of opening, and the invitation number on the face of the envelope. Telegraphic bids will not be considered unless authorized by the Invitation; however, bids may be modified by telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

(*b*) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at bidder's request and expense, unless otherwise specified by the Invitation.

(*c*) In the event no bid is to be submitted, do not return the Invitation unless otherwise specified. However, a letter or post card should be sent to the issuing office advising whether future Invitations for the type of supplies or services covered by this Invitation are desired.

3. WITHDRAWAL OF BIDS.—Bids may be withdrawn by written or telegraphic notice (see 4 below).

4. LATE BIDS.—Bids and modifications or withdrawals thereof received after the time set for opening will not be considered, unless they are received before the award is made, and it is determined by the Government that failure to arrive on time was due solely to delay in the mails for which the bidder was not responsible.

5. GOVERNMENT-FURNISHED PROPERTY.—No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the Invitation.

6. LABOR INFORMATION.—Attention is invited to the possibility that wage determinations may have been made under the Walsh-Healey Public Contracts Act providing minimum wages for employees engaged in the manufacture for sale to the Government of the supplies covered by this Invitation for Bids. Information in this connection, as well as general information as to the requirements of the Act concerning overtime payment, child labor, safety and health provisions, etc., may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington 25, D. C. Requests for information should state the Invitation number, the issuing agency and the supplies covered.

7. DISCOUNTS.—(*a*) Prompt-payment discounts will be included in the evaluation of bids, provided the period of the offered discount is sufficient to permit payment within such period in the regular course of business under the delivery, inspection, and payment provisions of the Invitation and Bid.

(*b*) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of those points, or from date correct invoice or voucher is received in the office specified by the Government if the latter date is later than the date of delivery. Payment is deemed to be made, for the purpose of earning the discount, on the date of mailing of the Government check.

8. AWARD OF CONTRACT.—(*a*) The contract will be awarded to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to the Government, price and other factors considered.

(*b*) The Government reserves the right to reject any or all bids and to waive informalities and minor irregularities in bids received.

(*c*) The Government may accept any item or group of items of any bid, unless the bidder qualifies his bid by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, BIDS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY BID UPON AT THE UNIT PRICES OFFERED UNLESS THE BIDDER SPECIFIES OTHERWISE IN HIS BID.

(*d*) A written award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid shall be deemed to result in a binding contract without further action by either party.

9. SELLER'S INVOICES.—Invoices shall be prepared and submitted in quadruplicate unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals. Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading.

10. DEFINITION OF SMALL BUSINESS.—Generally, a small business concern for the purpose of Government procurement is a concern that (1) is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or (2) is certified as a small business concern by Small Business Administration. (*See Code of Federal Regulations, Title 13, Part 103, as amended, which contains the detailed definition and related procedures.*)

Reverse of Standard Forms 30 and 33
October 1957 Edition

U. S. GOVERNMENT PRINTING OFFICE : 1958 O - 484462

DELETED

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER OR INVITATION NO. (If applicable)

PAGE NO. 3

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

CONTINUATION OF TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

246

11. BIDS MUST SET FORTH FULL, ACCURATE AND COMPLETE INFORMATION AS REQUESTED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001.

Conditions 3 and 4 are deleted and the following condition substituted therefor:

[fol. 345]

12. LATE BIDS AND MODIFICATIONS OR WITHDRAWALS. Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of the bids will not be considered, unless they are received before award is made and (i) are submitted by mail (or by telegraph if authorized), and (ii) it is determined by the Government that late receipt was due solely to either (A) delay in mails (or by the telegraph company if telegraphic bids are authorized) for which the bidder was not responsible or (B) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

13. "BUY AMERICAN CERTIFICATE" the bidder or offeror hereby certifies that each end product, except the end products excluded below, is a domestic source end product (as defined in the contract clause entitled Buy American Act; and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

EXCLUDED ITEMS: _____

14. NOTICE TO BIDDERS — Bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making multiple awards. For this purpose, the cost of issuing an advertised contract is estimated to be $50. Accordingly, where several items are included in an invitation for bid and after opening bids it is ascertained that no one responsible bidder submitted the lowest price on each of the items, the $50 factor or whether it will be to the best interest of the Government to make multiple awards will be considered, other factors being equal.

DELETED DELETED

15. INCONSISTENCIES IN PROVISIONS. In the event of an inconsistency between provisions of this invitation for bids, the inconsistency shall be resolved by giving precedence in the following order: (1) the Schedule; (2) Terms and Conditions of the Invitation for Bids; (3) General Provisions; (4) other provisions of the contract, whether incorporated by reference or otherwise; (5) the Specifications.

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

Standard Form 36
General Services Administration, Nov 1949 Ed.

ON NUATION SHEET
(SUPPLY CONTRACT)

CONTRACT ORD OR INVITATION NO. (If applicable) | PAGE NO. 4

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

SPECIFICATIONS

1. Specifications applicable to this Invitation for Bid are on file and may be examined this office, at Bldg. 1149.

2. The General Services Administration issues, free of charge, single copies of Standard Federal specifications at its ten regional offices when same are needed to complete a bid. Inquiries may be addressed to the General Services Regional Office at any one of the following locations:

Room 620, P.O. & Court House
Boston, Massachusetts

250 Hudson Street
New York City, N.Y.

Federal Supply Bldg.
7th & D Streets, S.W.
Washington 25, D.C.

Room 833
Peachtree Seventh Bldg.
50 7th Street N.E.
Atlanta 5, Georgia

Room 575 U.S. Court House
219 S. Clark Street
Chicago 4, Illinois

2706 E Bannister Road
Kansas City, Missouri

1114 Commerce Street
Dallas 2, Texas

Bldg. 41
Denver Federal Center
Denver, Colorado

4th Floor
49 Fourth Street
San Francisco, California

Federal Office Bldg.
909 First Avenue
Seattle 4, Washington

Business Service Center
1031 S. Broadway
Los Angeles, California

3. Contractors desiring single copies of Military specifications for use on a particular invitation for bids or contract may obtain them from: Headquarters, Wright-Patterson Air Force Base, Ohio, ATTN: EWBFE. Reference bid or contract number.

4. All items, which call for an applicable specification, delivered under awards as instant IFB, shall be supported by a certificate from the manufacturer that the item(s) meet the specifications called for. Omission of this certificate may be cause for rejection of the shipment or delay in acceptance by the Government.

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

[Fol. 346]

Standard Form 36
Prescribed by General Services Administration, Nov. 1960 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable): IFB 08-637-61-105

PAGE NO: 5

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	General Provisions, Bakery & Dairy Products, Pages 1 thru 14 are hereby made a part of this invitation and any resulting contract.				
	Dairy Products for delivery as called for during the period 1 Jan 61 thru 31 Dec 61	ESTIMATED			
1.	Milk, whole, fresh, Fed Spec C-M-381g, dtd 19 Sep 60 Type 1, No. 1, pasteurized, homogenized. Reconstituted or recombined milk will not be acceptable material. Packaged in 5 gallon dispenser cans.	98,000	gal	60	58,800 00
2.	Milk, whole, fresh, Fed Spec C-M-381g, dtd 19 Sep 60 Type 1, No. 1, pasteurized, homogenized. Reconstituted or recombined milk will not be acceptable material. Packaged for domestic use in non-returnable containers to prevent breakage or leaking in transit. Individual containers to be code dated with the day bottled. Fiber containers.	98,000	½ pt	045	4,410 00
3.	Cottage Cheese, minimum 4% butterfat Fed Spec C-C281C, 9 Mar 60 & Amend dated Mar 60, Type II, containers to be not more than 5 lb size and not less than 1 lb sizes glass or fiber.	18,000	lb	18	3,240 00
4.	Buttermilk, fresh Fed Spec C-B-816B, individual containers to be code dated with the date bottled. Fiber containers.	40,000	½ pt	035	1400 00
5.	Milk Chocolate, ½ pt Spec MIL-M-3801 Type 1, Class 1.	25,000	½ pt	045	1125 00
					6,975 00
	The following information must be submitted concerning the principal producing facilities, names and addresses of owner and operator. AWARD WILL BE MADE ON OVERALL TOTAL AGGREGATE - MULTIPLE AWARDS WILL NOT BE MADE.				
	(A) Location of principal producing facilities, including State, City Street, No., etc. (To be completed by Bidder) 639 W. Gregory St. Pensacola Fla				

NAME OF BIDDER OR CONTRACTOR:

Standard Form 36
Nov. 1960 Edition

[fol. 347]

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

(B) Names and addresses of owner and operator.

1. OWNER: Polar Dairy Farms Co
P O Box 636 Gregory
Pensacola Fla

2. OPERATOR:
J. W. Firestone / Vice
C. Firestone / Trucks
L. E. Dairy Plant Emp.

PRESERVATION AND PACKAGING: Milk shall be furnished in cartons with the exception of item one. Item one shall be in 5 gallon containers that carry the following specifications for containers - Military Standard 175, dated 12 April 1956, and method of processing in bulk U. S. Public Sanitary Standard 3-a containers must be either Norris, Buhl or Firestone.

Dispensing Tubes and Dispensing Devices and Mechanisms:

Single service non-metal dispensing tubes for use without bactericidal treatment at the milk plant shall be clean and shall (1) be given bactericidal treatment at the tube fabricating plant so that they shall not have more than one colony per ML of capacity in 3 out of 4 samples examined by the rinse method described in "Standard Methods for the Examination of Dairy Products"; (2) be individually packaged in a moisture-proof, non-toxic material either prior to bactericidal treatment or after such treatment by methods and in materials which preclude recontamination; (3) be capable of being applied to the container without recontamination of product contract surfaces and (4) be closed or sealed at the dispensing end, so as to make tube's reuse impracticable.

A moisture-tight compartment or covering shall be provided for the protection of entire dispensing tube when attached to the container. If the tube is not provided with a moisture-proof covering it shall be so made that it shall be housed in a compartment having a moisture-tight closure which is removable after the container is placed in the cabinet. Such compartment closure shall be so made that it cannot be reused or returned to its original condition after removal or a multiple use moisture-tight closure that is tamperproof may be used. The tube covering shall be removable after the container is placed in the cabinet and shall be so made that it cannot be re-used or returned to its original condition after removal. The

NAME OF BIDDER OR CONTRACTOR

[fol. 348]

249

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable): IFB 08-637-61-105 | PAGE NO. 7

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

dischargo opening of the dispensing tube shall be provided with a moisture-tight single-use closure or plug and single-use covering which is removable after the dispensing tube is placed in the operating position.

The following milk dispensers to be furnished by the contractor and any cost in connection with the dispensers to be included in the unit cost of item one.

8 each - 3 can dispensers
2 each - 2 can dispensers

NOTE: Delete Bldg. 1149 from Page 4.
Specifications applicable to this invitation for bid are on file and may be seen at Base Veterinarian Office, Bldg. #628, TAFB.

Delivery will be made no sooner 7:30 AM, CST, no later than 11:00 AM. CST Monday thru Saturday to the following places:

Consolidated Mess #1, Building #354
Consolidated Mess #2, Building #422
Officers' Mess #3, Building #505
Hospital Mess, Building #618

Inspection and Acceptance to be made by the Base Veterinarian, Bldg. 628.

Procurement of the supplies covered by this invitation is assigned to the Department of the Army and clearance for Local Purchase is covered by Ltr from Quartermaster Market Center, New Orleans, La. referenced QM MOPDB 434, undated, Subject "Authorization to Purchase MILK and AFP 145-1-1.".

"The requirements contained in this contract are for specification type items, and notwithstanding anything to the contrary in the General Provisions, this contract is not to be construed to prevent the Government from procuring similar products of brand name for resale purposes from other sources."

Your attention is invited to Clause 25 of the General Provisions entitled "Estimated Requirements."

Any inquiries or correspondence relative to the subject matter contained herein should be directed to A3C Bess, PH, AT 6-2111, Ext. 21251, Tyndall AFB, Florida.

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY, CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (If applicable)

PAGE NO. 8

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

NOTICE OF SMALL BUSINESS SET-ASIDE

(a) Restriction. Bids or proposals under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns. This action is based on a determination by the Contracting Officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of government procurement is placed with small business concerns. Bids or proposals received from firms which are not small business concerns shall be considered non-responsive.

(b) Definitions. (1) A "small business concern" is a concern that (i) is certified as a small business concern by the Small Business Administration, or (ii) is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs either fewer than 500 employees or, if the concern qualifies as a labor surplus area concern, fewer than 625 employees. In addition to meeting these criteria, a manufacturer or regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided, that this additional requirement does not apply in connection with construction or services contracts.

(2) A "labor-surplus area" is a geographical area which at the time of award is--

(i) classified by the Department of Labor as an "Area of Substantial Labor Surplus" or as an "Area of Substantial and Persistent Labor Surplus" and listed as such by that Department in conjunction with its bi-monthly publication "Area Labor Market Trends"; or

(ii) not classified as in (i) above, but which is individually certified as an area of persistent or substantial labor surplus by the Department of Labor at the request of any prospective contractor.

(3) Labor Surplus area concern includes--

(i) persistent labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial and Persistent Labor Surplus"; and

(ii) substantial labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial Labor Surplus."

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

[Fol. 350]

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) | PAGE NO. 9

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

A concern shall be deemed to perform a contract substantially in "Areas of Substantial and Persistent Labor Surplus" if the costs that it incurs on account of manufacturing or production (by itself or its subcontractors) in such areas amount to more than 50 percent of the contract price. A concern shall be deemed to perform a contract substantially in "Areas of Substantial Labor Surplus" if the costs that it incurs on account of manufacturing or production (by itself or its subcontractors) in such areas or in "Areas of Substantial or Persistent Labor Surplus" amount to more than 50 percent of the contract price.

AMENDMENT TO INVITATION FOR BIDS

PAGE NUMBER: 1 | NUMBER OF PAGES: 1

AMENDMENT NO.: 2	DATE AMENDMENT ISSUED: 5 May 1961
ISSUING OFFICE: Base Procurement Office Tyndall AFB, Florida	IFB NO.: 06-637-61-105
	DATE IFB ISSUED: 14 April 1961
	DATE AND HOUR OF OPENING: 1:00 PM CST 15 May 1961
ITEM: Procurement Dairy Prod, Troop Issue	PURCHASE AUTHORIZATION: AESQ-B Ltr dtd 12 Apr 61

THE ABOVE IFB IS AMENDED AS FOLLOWS (All Other Terms and Conditions Remain Unchanged):

By deleting Clause 13, entitled "Nondiscrimination In Employment" from Page four of General Provisions, Bakery and Dairy Products Contracts, and substituting in lieu thereof new Clause #13 entitled "Nondiscrimination In Employment (AFR 1961); a copy of which is attached hereto and made a part hereof.

THE BID OPENING DATE ☒ IS NOT EXTENDED: ☐ IS EXTENDED UNTIL _____ O'CLOCK

_____ M., _____ TIME _____ DATE

NOTICE TO BIDDERS

Bidders must acknowledge receipt of this Amendment prior to the hour and date set for bid opening, by one of the following methods:

a. By signing and returning 3 copies of this Amendment.

b. By a notation acknowledging receipt of this Amendment on each copy of the bid submitted.

c. By separate letter or telegram which includes a reference to the IFB Number and Amendment Number.

Failure of your acknowledgement to be received at the issuing office prior to the hour and date fixed for opening of bids may result in the rejection of your bid. If, by virtue of this Amendment, it is desired to modify a bid already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Amendment and is received prior to the opening hour and date specified above.

FULL NAME OF BIDDER (Type or Print): Pelandaheam Terrace Co	SIGNATURE OF PERSON AUTHORIZED TO SIGN: [signature]
ADDRESS: 2228 Pensacola Fla	TYPE OR PRINT SIGNER'S NAME AND TITLE: Pres

DD FORM 1 DEC 58 1260

[Fol. 352]

253

NONDISCRIMINATION IN EMPLOYMENT: (Apr 1961)

In connection with the performance of work under this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of The President's Committee on Equal Employment Opportunity created thereby.

(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925, of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of The President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(Continued on Reverse)

(7) The contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of The President's Committee on Equal Employment Opportunity issued pursuant to Section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: Provided however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

[fol. 353a]

AMENDMENT TO INVITATION FOR BIDS

PAGE NUMBER	NUMBER OF PAGES
1	1

AMENDMENT NO.	DATE AMENDMENT ISSUED
1	2 May 1961

ISSUING OFFICE	IFB NO.
Base Procurement Office Tyndall AFB, Florida	08-637-61-105
	DATE IFB ISSUED: 14 April 1961
	DATE AND HOUR OF OPENING: 1:00 PM, CST, 15 May 1961

ITEM	PURCHASE AUTHORIZATION
Procurement Dairy Prod. Troop Issue	ABSQ-B Ltr dtd 12 Apr 61

THE ABOVE IFB IS AMENDED AS FOLLOWS (All Other Terms and Conditions Remain Unchanged).

a. Add the following to items 1 and 2:

(1) Vitamin D is not required and will not be added.

(2) Maximum time between pasteurization and delivery shall not exceed 48 hours unless otherwise specified by the Contracting Officer.

(3) When called for by the Contracting Officer the Contractor shall furnish a U. S. Dept. of Agriculture Inspection or Grading Certificate, evidencing quality and condition.

b. Add the following under PRESERVATION & PACKAGING, Page 6 of the schedule, "Scholle-Pak" or equal will be acceptable for Item 1 provided containers are not returnable.

THE BID OPENING DATE ☒ IS NOT EXTENDED; ☐ IS EXTENDED UNTIL _____ O'CLOCK

_____ M., _____ TIME _____ DATE

NOTICE TO BIDDERS

Bidders must acknowledge receipt of this Amendment prior to the hour and date set for bid opening, by one of the following methods:

a. By signing and returning 3 copies of this Amendment.
b. By a notation acknowledging receipt of this Amendment on each copy of the bid submitted.
c. By separate letter or telegram which includes a reference to the IFB Number and Amendment Number.

Failure of your acknowledgement to be received at the issuing office prior to the hour and date fixed for opening of bids may result in the rejection of your bid. If, by virtue of this Amendment, it is desired to modify a bid already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Amendment and is received prior to the opening hour and date specified above.

FULL NAME OF BIDDER (Type or Print)	SIGNATURE OF PERSON AUTHORIZED TO SIGN
Pet Dairy Products Co	
ADDRESS: Pensacola Fla	TYPE OR PRINT SIGNER'S NAME AND TITLE: Pres

DD FORM 1 DEC 58 1260

[fol. 354]

256

GENERAL PROVISIONS
BAKERY AND DAIRY PRODUCTS
CONTRACTS

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. INSPECTION

All services, material and workmanship shall be subject to inspection and test by representatives of the Government. For this purpose, the Contractor shall allow at all reasonable times inspectors and other Government personnel free access to the plant and operations and shall furnish such facilities, supplies and services as may be required for this work.

3. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

4. PAYMENTS

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warwants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

5. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940 as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

6. DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates

this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: Provided, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (c) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Terminations for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (Except as otherwise provided in this contract, this paragraph (e) applies only if this contract contains such clause.)

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

7. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

[fol. 356]

258

8. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any suit against the Government, or any claim against the Government made before suit has been instituted, on account of any alleged patent infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

9. BUY AMERICAN ACT

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10-a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "component" means those articles, materials, and supplies, which are directly incorporated in end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall, except as provided in (c) of this clause, be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except that products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(c) Any component mined, produced, or manufactured in Canada, but not set forth in the list of Canadian supplies excepted by the Secretary and maintained pursuant to paragraph 6-103.5(a) of the Armed Services Procurement Regulations shall be treated as a component mined, produced, or manufactured outside the United States, for the purpose of (a)(iii)(B) above, unless such component is to be incorporated in an end product to be delivered under this contract which is on such list, or is an item on the list set forth in paragraph 6-105 of the Armed Services Procurement Regulations, or is otherwise determined to be nonavailable as mentioned in (b)(ii) above.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

10. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

11. EIGHT-HOUR LAW OF 1912--OVERTIME COMPENSATION

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U.S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U.S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912, as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer

[fol. 357]

or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

12. WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

13. NONDISCRIMINATION IN EMPLOYMENT

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(b) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

14. OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

15. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

16. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

(ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination.

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government;

(vii) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; provided, however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct.

[fol. 359]

(viii) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to settlement.

(e) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (e), and subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(i) for completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b)(vii) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(ii) the total of-

(A) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(i) hereof;

(B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(v) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (A) above; and

(C) a sum, as a profit, equal to 2 percent of that part of the amount determined

263 [Vol. 360]

under (A) above which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above, which amount for the purpose of this subdivision (C) shall exclude any charges for interest on borrowings; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(iii) the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (i) and (ii) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in (e)(i) and (ii)(A) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(vii).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in paragraph 8-302 of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, it shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the Office of the Contractor but without direct charge to the Government, all its books, records, documents, and other evidences bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent

[fol. 361]

approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

17. UTILIZATION OF SMALL BUSINESS CONCERNS

(The provisions of this clause shall be applicable only if the amount of this contract exceeds $5,000.)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

18. GRATUITIES

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

19. VEHICLES OR CONVEYANCES

Vehicles or conveyances used in the transportation of items called for in this contract shall consist of clean, closed vehicles conforming to high standards of commercial transportation, equipped to protect against contamination of the product. These vehicles or conveyances shall be subject to examination at all times by the Contracting Officer or his duly authorized representative.

20. FEDERAL FOOD, DRUG, AND COSMETIC ACT

All deliveries shall comply with the provisions of the Federal Food, Drug, and Cosmetic Act, Public Law 717, 75th Congress, as amended.

21. SANITARY INSPECTION

(a) Award of items listed on this Invitation for Bids shall be made only to a bidder whose facilities at which such items are to be produced have been inspected or otherwise approved by an officer of the Air Force Veterinary Corps or the Army Veterinary Corps within 30 days prior to the opening date of this Invitation for Bids. In the event that the inspection reveals the existence of unsanitary conditions, the bidder shall be informed of such conditions in writing, by the Contracting Officer prior to award; and no award shall be made to that bidder unless the conditions are immediately corrected, reinspection requested, and on such reinspection the facilities are found satisfactory and approved.

(b) The Government reserves the right to inspect the Contractor's facilities at all reasonable times during the performance of this contract. If an inspection reveals the existence of unsanitary conditions, the Contractor shall be requested, in writing, by the Contracting Officer to correct such conditions. Refusal to correct unsanitary condition shall constitute sufficient cause for the Government to terminate this contract immediately in accordance with the clause hereof entitled "Default" and without waiting ten days for the correction of the condition.

(c) Bidders may obtain sanitary inspection of their facilities by applying in writing to the Contracting Officer named herein not less than 10 calendar days prior to the opening date of this Invitation for Bids.

(d) The results of any sanitary inspection by the Department of the Air Force or the Department of the Army shall not be used for private sales promotion or advertising purposes.

22. CONTAINERS

(This clause will apply only if contract is for bakery products)

Delivery shall be made in suitable containers which shall not be included in the contract price. The Contractor shall be required to pick up his containers. The Government will not be responsible for any loss or damage to the containers.

[fol. 362] 264

23. MILK BOTTLES

a. (This clause will apply only if this contract is for delivery of milk in bottles for other than resale purposes)

When milk is delivered in glass bottles, the cost of the bottle shall not be included in the price of the milk, and the bottles shall remain the property of the Contractor. The Government will endeavor to prevent undue breakage or loss of bottles while in its possession; however, the Government shall not be held responsible or liable in any way for any bottles which may become broken or lost.

b. (This clause will apply only if this contract is for delivery of milk in bottles for commissary resale purposes)

The unit price of the glass containers furnished by the Contractor for the delivery of milk hereunder shall be set forth separately in the schedule. The Contractor shall bill the Government for the price of the products delivered plus the price of the glass containers. The Contractor shall pick up the reusable glass containers at the Commissary Store periodically at the request of the Commissary Officer, and shall refund to the Government in cash, or check payable to the Commissary Officer, the aggregate value of the picked up reusable containers. This value shall be computed at the respective unit container prices specified in the schedule.

24. PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES

The Contractor agrees that there will be delivered under the contract only such articles of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused or produced in the United States, its Territories, its possessions, or Puerto Rico; provided that this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices; provided further, that nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed inthe United States, its Territories, its possessions, or Puerto Rico.

25. ESTIMATED REQUIREMENTS

(a) The quantities of supplies and services which the Government estimates that the Government activity named in the Schedule will require during the period covered by this contract are set forth in the Schedule. These quantities are estimated only and are not purchased hereby.

(b) The Government agrees to call on the Contractor for all the requirements for such supplies and services of the Government activity named in the schedule. The Contractor agrees to furnish such supplies and services when called for by the Government.

(c) In the event that the requirements of the Government activity named in the Schedule for the supplies and services described herein do not materialize in the quantities specified as either "estimated" or "maximum" in the schedule, such failure shall not constitute grounds for equitable adjustment under this contract, except as may be specifically provided in the schedule.

26. LABORATORY ANALYSIS

(This clause will apply only if this contract is for delivery of milk, milk products or ice cream)

(a) During the life of this contract a Government inspector will draw samples from not less than three shipments during each monthly period for laboratory analysis. If such analysis reveals a percentage of butterfat below that specified elsewhere in this contract, the weighted average butterfat percentage of the lots from which the samples were drawn shall be ascertained on the basis of the percentage in the samples, and all products delivered during the month shall be deemed to have contained the average percentage of butterfat so ascertained.

(b) If the average butterfat content so determined is below contract requirements, the price per unit paid to the Contractor for that month shall be in the same ratio to the contract price per unit as the average butterfat content so determined is to the average butterfat content required to be delivered. No payment over the contract unit price will be made for any delivery of products containing more than the required percentage of butterfat, as stated in the contract.

(c) The foregoing is an agreed formula for adjustment of prices for accepted products which might have been rejected, and is without prejudice to the Government's right to terminate for default or to pursue any other remedy under this contract or provided by law.

27. EXAMINATION OF RECORDS

(This clause will apply only to negotiated contracts in excess of $2,500)

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books,

[Fol. 363]

documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $2,500 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

28. FEDERAL, STATE, AND LOCAL TAXES **AMENDED**

(a) As used throughout this clause, the term "tax inclusive date" means the date of negotiated contracts and the date set for the opening of bids for contracts entered into through formal advertising. As to additional supplies or services procured by modification to this contract, the term "tax inclusive date" means the date of such modification.

(b) Except as may be otherwise provided in this contract, the contract price includes all Federal, State, and local taxes and duties in effect and applicable to this contract on the tax inclusive date, except taxes (other than Federal transportation taxes) from which the Government, the Contractor, or the transactions or property covered by this contract are then exempt. Unless specifically excluded, duties are included in the contract price, and, if freight is included in the contract price, Federal transportation taxes are likewise included.

(c) (1) If the Contractor is required to pay or bear the burden--

(i) of any tax or duty, which either was not to be included in the contract price pursuant to the requirements of paragraph (b), or was specifically excluded from the contract price by a provision of this contract; or

(ii) of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price;

or of any interest or penalty thereon, the contract price shall be correspondingly increased; provided that the Contractor warrants in writing that no amount for such tax, duty, or rate increase was included in the contract price as a contingency reserve or otherwise; and provided further that liability for such tax, duty, rate increase, interest, or penalty was not incurred through the fault or negligence of the Contractor or its failure to follow instructions of the Contracting Officer.

(2) If the Contractor is not required to pay or bear the burden, or obtains a refund or drawback, in whole or in part, of any tax, duty, interest, or penalty which (i) was to be included in the contract price pursuant to the requirements of paragraph (b), (ii) was included in the contract price, or (iii) was the basis of an increase in the contract price, the contract price shall be correspondingly decreased or the amount of such relief, refund, or drawback shall be paid to the Government, as directed by the Contracting Officer. The contract price also shall be correspondingly decreased if the Contractor, through its fault or negligence or its failure to follow instructions of the Contracting Officer, is required to pay or bear the burden, or does not obtain a refund or drawback of any such tax, duty, interest, or penalty. Interest paid or credited to the Contractor incident to a refund of taxes shall inure to the benefit of the Government to the extent that such interest was earned after the Contractor was paid or reimbursed by the Government for such taxes.

(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this paragraph (c) shall set forth the amount thereof as a separate item and shall identify the particular tax involved.

(4) Nothing in this paragraph (c) shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes; Federal transportation taxes, except changes in the rate thereof, including repeal, pertaining to shipments from the Contractor to the Government; unemployment compensation taxes; or any State and local taxes, except those levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract, including gross income taxes, gross receipts taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipts from sales.

(5) No adjustment of less than $100 shall be made in the contract price pursuant to this paragraph.

(d) Unless there does not exist any reasonable basis to sustain an exemption, the Government agrees upon request of the Contractor, without further liability except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from (i) any Federal tax, which the Contractor warrants in writing was excluded from the contract price, or (ii) any State or local tax; provided that evidence appropriate to establish exemption from duties will be furnished, and Government bills of lading will be issued, only at the discretion of the Contracting Officer. In addition, the Contracting Officer may furnish evidence appropriate to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price.

(e) (1) The Contractor shall promptly

notify the Contracting Officer of all matters pertaining to Federal, State, and local taxes and duties that reasonably may result in either an increase or decrease in the contract price.

(2) Whenever an increase or decrease in the contract price may be required under this clause, the Contractor shall take action as directed by the Contracting Officer, and the contract price shall be equitably adjusted to cover the costs of such action, including any interest, penalty, and reasonable attorney's fees.

29. RENEGOTIATION

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of Contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in Section 103g of the Renegotiation Act of 1951, as amended.

30. UTILIZATION OF CONCERNS IN LABOR SURPLUS AREAS

(The provisions of this clause shall be applicable only if the amount of this contract exceeds $5,000)

It is the policy of the Government to place supply contracts with suppliers who will perform such contracts substantially in areas of current labor surplus where this can be done, consistent with the efficient performance of the contract, at prices no higher than are obtainable elsewhere. The Contractor agrees to use its best efforts to place its subcontracts in accordance with this policy. In complying with the foregoing and with paragraph (b) of the clause of this contract entitled "Utilization of Small Business Concerns," the Contractor in placing its subcontracts shall observe the following order of preference: (i) small business concerns in labor surplus areas; (ii) other concerns in labor surplus areas; (iii) small business concerns not in labor surplus areas.

DELETED

31. APPROVAL OF CONTRACT

(This provision will apply only if the amount of this contract is in excess of $ 20,000.00)

This contract shall be subject to the written approval of the Secretary of the Air Force or his duly authorized representative and shall not be binding until so approved.

32. ALTERATIONS IN CONTRACT

The following alterations have been made in the provisions of this contract.

(a) General Provision 28, FEDERAL, STATE AND LOCAL TAXES, is amended to include the following statement:

The Term "except as otherwise provided in this contract" means "except as the Government has otherwise provided in this IFB" and shall not be construed to permit the bidder to submit bids conditioned on exclusions of tax not set forth in the IFB.

(b) General Provision 30, Utilization of Concerns in Labor Surplus Areas, is hereby deleted and the following substituted therefor:

30. UTILIZATION OF CONCERNS IN LABOR SURPLUS AREAS (The provisions of this clause shall be applicable only if the amount of this contract exceeds $5,000.)

It is the policy of the Government to place supply contracts with suppliers who will perform such contracts substantially in areas of persistent or substantial labor surplus where this can be done, consistent with the efficient performance of the contract, at prices no higher than are obtainable elsewhere. The contractor agrees to use his best efforts to place his subcontracts in accordance with this policy. In complying with the foregoing and with paragraph (b) of the clause of this contract entitled "Utilization of Small

[fol. 365]

Business Concerns," the Contractor in placing his subcontracts shall observe the following order of preference: (i) persistent labor surplus area concerns which are also small business concerns; (ii) other persistent labor surplus area concerns; (iii) substantial labor surplus area concerns which are also small business concerns; (iv) other substantial labor surplus area concerns; and (v) small business concerns which are not labor surplus area concerns.

(c) General Provision 28, FEDERAL, STATE AND LOCAL TAXES, is amended by addition of the following paragraph:

(f) (If the resulting contract or any portion thereof is to be performed in the State of Illinois the following will apply.) The contract price does not include any amount for Illinois State and Municipal Retailers Occupation (Sales) tax imposed on gross receipts derived from sales in Illinois of tangible personal property to the Federal Government. Though expressly excluded from the contract price, the amount of the State and Municipal Retailers Occupation Tax estimated to be applicable to the completed supplies covered by this contract is set forth in the Schedule. If the contractor is required to pay such tax and makes payment thereof as directed by the Contracting Officer, the contract price shall be adjusted in accordance with the provisions of the clause of this contract entitled, "Federal, State and Local Taxes." The contract price shall similarly be adjusted if, subsequent to any such reimbursement under this contract, the imposition of said tax is removed.

(d) General Provision 9, BUY AMERICAN ACT, is deleted and the following substituted therefor:

9. BUY AMERICAN ACT (JUL. 1960)

(a) In acquiring end products, the Buy American Act (41 U.S.C. 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause: (i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products; (ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and (iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products: (i) which are for use outside the United States; (ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a

satisfactory quality; (iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or (iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954)

33. SUPERSEDING SPECIFICATIONS

All references in any Government specification incorporated herein to other Government specifications shall be deemed to include all specifications supplementary to or superseding the specifications so referred to, to the extent that such supplementary or superseding specifications are in effect at the date of Contractor's latest quotation, if the Contractor was furnished or otherwise notified of the existence of such supplementary or superseding specification at the time of said quotation.

34. CHANGES

The Contracting Officer may, at any time, by a written order, and without notice to the sureties, if any, make changes in or additions to drawings and specifications, issue additional instructions, require modified or additional work or services within the general scope of the contract, change the place of delivery or method of shipment, or the amount of Government furnished property. If any such changes cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price, or time of performance, or both, and the contract shall be modified in writing accordingly. Any claim by the contractor for adjustment under this clause must be asserted within sixty (60) days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

35. SUBCONTRACTS

No contract shall be made by the contractor with any other party for furnishing any of the complete or substantially completed articles, spare parts, or work herein contracted for, without the written approval of the Contracting Officer as to sources.

36. SAFETY AND ACCIDENT PREVENTION
(This clause is applicable to any contract which is performed in whole or in part on an AF base or other AF installation under the direct control of the Government)

In performing any work under this contract on premises which are under the direct control of the Government, the Contractor shall (i) conform to all safety rules and requirements prescribed in Air Force Manual 32-3, as in effect on the date of this contract and (ii) take such additional precautions as the Contracting Officer may reasonably require for safety and accident prevention purposes. The Contractor agrees to take all reasonable steps and precautions to prevent accidents and preserve the life and health of Contractor and Government personnel performing or in any way coming in contact with the performance of this contract on such premises. Any violation of such rules and requirements, unless promptly corrected, as directed by the Contracting officer, shall be grounds for termination of this contract in accordance with the default provisions hereof.

[fol. 681] 270

ADDITIONAL GENERAL PROVISIONS
BAKERY AND DAIRY PRODUCTS
CONTRACTS

37. WEIGHT OF CONTAINERS

The average tare weight of cans, lids, tubes and seals, as a complete unit, will be determined by the contractor prior to the beginning of the milk contract. This tare weight will be furnished the inspector by the contractor as a certification on the shipping document, copy of which will be supplied inspector. The verification of contractors' tare weight will be the responsibility of the inspector. In the event contractor utilizes cans of different weights (different manufacturer or reworked) in a single delivery, it will be his responsibility to furnish the inspector average unit tare weight for each group, identifying features of each group and certification of different group tares. In determining the net weight, milk will be considered to weigh 8.6 lbs. per gallon.

Standard Form 26
Prescribed by General Services Administration, Nov. 1949 Edition

AWARD
(SUPPLY CONTRACT)

CONTRACT NO.	PAGE NO	NUMBER OF PAGES OF AWARD
N61331s-1092	1	1

ORDER NO. (If any)

DATE OF AWARD: 22 June 1961

INVITATION NO.: 61331-4-62

TO (Contractor and address):
Polar Ice Cream Creamery Co.
639 W. Gregory Street
Pensacola, Florida

ISSUED BY:
Supply Officer
U. S. Navy Mine Defense Laboratory
Panama City, Florida

INVOICE FOR PAYMENT SHOULD BE MAILED TO:
Supply Officer
U. S. Navy Mine Defense Laboratory
Panama City, Florida

PAYMENT WILL BE MADE BY:
U. S. Navy Regional Accounts Office
U. S. Naval Base
Norfolk 11, Va.

Your bid on the above numbered Invitation for Bids is hereby accepted as to the items enumerated below with the additions or changes made by you, which additions or changes are set forth in full below.

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	FOR DELIVERY IN ACCORDANCE WITH THE SCHEDULE OF THE INVITATION AND BID				
	MILK, fresh, Pasteurized, Homogenized:				
1.	1/2 Pint Cartons.	20,000	1/2 Pt.	.045	$900.00
2.	5-gallon cans, bulk dispenser use.	4,000	Gal	.60	2,400.00
	Items 1 and 2 shall be in accordance with Specifications C-M-381e dated 8-[illegible]-50 and Amend. 3 dated 10-9-56, Type III, No. 1.				
3.	Buttermilk, cultured, 1 qt. cartons, to be in accordance with Specifications C-B-816b dated 5-20-52, Type I.	250	Qt.	.11	27.50
4.	Chocolate flavored drink, 1 qt. cartons, to be in accordance with Specifications Mil-M-3801 dated 9-3-52 and Amend. 2 dated 6-10-54, Type III, Class 2.	1200	Qt.	.10	120.00
5.	Cottage Cheese, creamed, 16 oz. cartons, to be in accordance with Specifications C-C-281c dated 3-9-50, Type II.	136	Ctn	.18	24.48
6.	Cottage Cheese, creamed, 2 lb. cartons, to be in accordance with Specifications C-C-281c dated 3-9-50, Type II.	20	Ctn	.35	7.00
	PRIORITY DO-C9 certified for national defense use under DMS Reg 1.				
				Estimated - TOTAL AMOUNT	$3,479.98

This Award consummates the contract, which consists of the following documents, including any Continuation Sheets thereto: (a) the Government's Invitation for Bids and your Bid, (b) the Schedule, (c) the General Provisions, and (d) the Government's Award. No further contractual document is necessary.

UNITED STATES OF AMERICA

BY J. R. Hale
for K. D. STRICKLER, CDR SC USN

CONTRACTING OFFICER

Standard Form 26
Nov. 1949 Edition

U. S. GOVERNMENT PRINTING OFFICE 16—62840-1

fol. 3701

272

☆ U. S. GOVERNMENT PRINTING OFFICE • 16—69268-1

APPROVAL OF CONTRACT

CONTRACTOR

Polar Ice Cream & Creamery Co.
639 W. Gregory Street
Pensacola, Florida

CONTRACT NUMBER

AF 08(630)-406

APPROVED: 27 Dec 1961

CHARLES W. DECAMP
Colonel USAF
Director of Procurement Mgt.
Air Defense Command

Standard Form 33 (Oct. 1957 Edition)
Prescribed by General Services Administration
Regulation 1-11.209.00

INVITATION, BID, AND AWARD
(SUPPLY CONTRACT)

CONTRACT NO. [redacted]
ORDER NO. (If any)

PAGE NO. 1 | NUMBER OF PAGES 8

ISSUED BY
Base Procurement Office
4751st Air Defense Wing (Missile) (ADC)

ADDRESS
Building 9012, Room 13
Eglin AF Auxiliary Field #9, Florida

Mrs. Coldiron: 643106

INVITATION FOR BIDS

DATE ISSUED 8 November 1961 | INVITATION NO. 08-620-62-11

Sealed bids in triplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions MCP 71-1032 1 May 61 edition), which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 3:00 o'clock P. m., C.S. Time, 8 December 1961 (date) and at that time publicly opened, for furnishing the supplies or services described in the accompanying Schedule, for delivery f. o. b. Eglin AF Auxiliary Field #9, Florida

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

P/R AFT 2551-170-62

SCHEDULE

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (No. of units)	UNIT	UNIT PRICE	AMOUNT
	(Milk and Dairy Products for Troop Issue and Commissary Resale) Notification of this procurement was published in the Department of Commerce Synopsis of the U. S. Government Proposed Procurements, Sales, and Contract Awards. (Allotment Basis) BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001. [redacted] Small Business Act.				

BID

DATE OF BID 6th Dec 1961

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within _____ calendar days (*60 calendar days unless a different period be inserted by the bidder*) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

_____ percent, 10 calendar days; _____ percent, 20 calendar days; _____ percent, 30 calendar days.

BIDDER REPRESENTS: (*Check appropriate boxes*)

(1) That he ☒ is, ☐ is not, a small business concern. (*See definition on reverse hereof.*) If bidder is a small business concern and is not the manufacturer of the supplies bid upon, he also represents that all supplies to be furnished hereunder ☒ will, ☐ will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a ☒ regular dealer in, ☒ manufacturer of, the supplies bid upon.

(3) (a) That he ☐ has, ☒ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☒ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer.
(*For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Part 1-16.*)

(4) He operates as an ☐ individual, ☐ partnership, ☒ corporation, incorporated in the State of Fla

NAME AND ADDRESS OF BIDDER (*Street, city, zone, and State; or type or print*)
Florida Ice Cream Vendors Co
635 W Gregory St
Pensacola Fla

SIGNATURE OF PERSON AUTHORIZED TO SIGN BID
[redacted]

TYPE OR PRINT SIGNER'S NAME AND TITLE
J. F. W. [redacted] Pres

AWARD

DATE OF AWARD 13 December 1961

ACCEPTED AS TO ITEMS NUMBERED 1 through 11 | AMOUNT $1,207.00 ESTIMATED

UNITED STATES OF AMERICA
BY [redacted] Contracting Officer.

SUBMIT INVOICE FOR PAYMENT TO
Accounting and Finance
Eglin AF Auxiliary Field #9, Florida

PAYMENT WILL BE MADE BY
Accounting and Finance
Eglin AF Auxiliary Field #9, Florida

ACCOUNTING AND APPROPRIATION DATA Funds are not obligated by this instrument. All calls or delivery orders placed against this contract will contain a certification of availability of funds together with a citation of the proper allotment account to be charged in making payment

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

10-60282-4

fol. 372 274

TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

1. PREPARATION OF BIDS. – (*a*) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder's risk.

(*b*) Each bidder shall furnish the information required by the bid form. The bidder shall print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent must be accompanied by evidence of his authority.

(*c*) Unit price for each unit bid on shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item bid on. In case of error in extension of price, the unit price will govern.

(*d*) Alternate bids will not be considered unless authorized by the Invitation.

(*e*) When not otherwise specified, bidder must definitely state time of proposed delivery.

(*f*) Time, if stated as a number of days, will include Sundays and holidays.

2. SUBMISSION OF BIDS.—(*a*) Bids and modifications thereof shall be enclosed in sealed envelopes addressed to the issuing office, with the name and address of the bidder, the date and hour of opening, and the invitation number on the face of the envelope. Telegraphic bids will not be considered unless authorized by the Invitation; however, bids may be modified by telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

(*b*) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at bidder's request and expense, unless otherwise specified by the Invitation.

(*c*) In the event no bid is to be submitted, do not return the Invitation unless otherwise specified. However, a letter or post card should be sent to the issuing office advising whether future Invitations for the type of supplies or services covered by this Invitation are desired.

3. WITHDRAWAL OF BIDS. Bids may be withdrawn by written or telegraphic notice (see 4 below).

4. LATE BIDS.—Bids and modifications or withdrawals thereof received after the time set for opening will not be considered, unless they are received before the award is made, and it is determined by the Government that failure to arrive on time was due solely to delay in the mails for which the bidder was not responsible.

5. GOVERNMENT-FURNISHED PROPERTY.—No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the Invitation.

6. LABOR INFORMATION.—Attention is invited to the possibility that wage determinations may have been made under the Walsh-Healey Public Contracts Act providing minimum wages for employees engaged in the manufacture for sale to the Government of the supplies covered by this Invitation for Bids. Information in this connection, as well as general information as to the requirements of the Act concerning overtime payment, child labor, safety and health provisions, etc., may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington 25, D. C. Requests for information should state the Invitation number, the issuing agency and the supplies covered.

7. DISCOUNTS.—(*a*) Prompt-payment discounts will be included in the evaluation of bids, provided the period of the offered discount is sufficient to permit payment within such period in the regular course of business under the delivery, inspection, and payment provisions of the Invitation and Bid.

(*b*) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of those points, or from date correct invoice or voucher is received in the office specified by the Government if the latter date is later than the date of delivery. Payment is deemed to be made, for the purpose of earning the discount, on the date of mailing of the Government check.

8. AWARD OF CONTRACT.—(*a*) The contract will be awarded to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to the Government, price and other factors considered.

(*b*) The Government reserves the right to reject any or all bids and to waive informalities and minor irregularities in bids received.

(*c*) The Government may accept any item or group of items of any bid, unless the bidder qualifies his bid by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, BIDS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY BID UPON AT THE UNIT PRICES OFFERED UNLESS THE BIDDER SPECIFIES OTHERWISE IN HIS BID.

(*d*) A written award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid shall be deemed to result in a binding contract without further action by either party.

9. SELLER'S INVOICES.—Invoices shall be prepared and submitted in quadruplicate unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals. Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading.

10. DEFINITION OF SMALL BUSINESS.—Generally, a small business concern for the purpose of Government procurement is a concern that (1) is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or (2) is certified as a small business concern by Small Business Administration. (*See Code of Federal Regulations, Title 13, Part 103, as amended, which contains the detailed definition and related procedures.*)

[Fol. 373]

275

U. S. GOVERNMENT PRINTING OFFICE 1957 O—449021

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-105

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. [redacted]

PAGE NO. 3

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	RESALE AND TROOP ISSUE	ESTIMATED			
1.	Milk, fresh, homo., past., qt, in carton Vitamin D will be added and the maximum time between pasteurization and delivery will be 48 hours. Fed Spec C-M-381g Type I No. I	2000	ctn	17	340.00
2.	Milk, fresh, homo., past., 1/2 gal in carton Vitamin D will be added and the maximum time between pasteurization and delivery will be 48 hours. Fed Spec C-M-381g Type I No. I.	155,000	ctn	.3140	48670.00 4/8270
3.	Buttermilk, cultured, qt, in carton Fed Spec C-B-816b Type I or II.	2000	ctn	.13	260.00
4.	Buttermilk, cultured, 1/2 gal. in carton Fed Spec C-B-816b Type I or II.	3000	ctn	.25	[illegible]
5.	Cream, fresh, whipping 1/2 pt., in carton Fed Spec C-C-671d Type I or II.	1000	ctn	.23	230.00
6.	Choc drink, past., qt, in carton MIL M-3801 dtd 3 Sep 52, Type II or I Class 1.	3000	ctn	16½	495.00
7.	Cottage cheese, creamed 16 oz. in carton Fed Spec C-C-281c, Type II Class A. [illegible]	1000	ctn	.25 .18	250.00
8.	Cottage cheese dry 16 oz. in carton Fed Spec C-C-281c Type I Class A. [illegible]	1000	ctn	.25 .18	250.00
9.	Creamed cottage cheese, past., 2 lb. in ctn. MIL SPEC C-C-281c Type I shall contain less than 1% milk fat.	1500	ctn	36	540.00
10.	Milk, fresh, skimmed, fortified, past., qt in carton shall contain less than 1% milk fat	6000	ctn	.13	780.00
11.	Cream, sour, 1/2 pint in carton best commercial grade except that a well developed culture of lactic acid bacteria shall be used to obtain a product having a good clean tasty flavor and a body which is smooth, firm and free from wheying off or indications of gas formation.	1500	ctn	.19	285.00
12.	Cream, half and half, pt in ctn, Fed Spec C-C-671d Type VI No. 1.	1800	ctn	.20	360.00

NAME OF BIDDER OR CONTRACTOR

[redacted]

Standard Form 36
Nov. 1949 Edition

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960: 847809

276 [fol. 374]

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-105

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) [redacted]

PAGE NO. 4

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
13.	Juice, orange, qt, in ctn, 100% pure, non-additive, fresh, chilled, best commercial grade.	1200	ctn	.32	38400
14.	Milk, Multi vitamin 1/2 gal. in carton best commercial grade.	1800	ctn	34	61200
15.	Egg nog, qt, in carton best commercial grade	200	ctn	45	9000
16.	Milk, fresh, homo, past, 5 gal can Fed Spec [illegible] Type I No.1.	25,000	gal	58	14500.00
17.	Cream, fresh, whipping, fiber qt container Type II, No. I Fed Spec C-C-671d.	250	ctn	75	18750
18.	Cream, fresh, coffee, fiber qt container Fed Spec C-C-671d, Type III No. I past.	250	ctn	45	11250
19.	Milk, fresh, homo., past., fiber container 1/2 pt. Fed Spec C-M-381g Type I No. I.	20,000	ctn	0475	9500.00
20.	Cottage cheese creamed bulk 1 lb. container Fed Spec C-C-281g, Type I, Class A.	3,000	ctn	18	5400
21.	Redi Diet, 900 calorie liquid drink or equal Best Commercial Grade	900	ctn	79	71100
	Bidding on: Manufacturer's Name_____ Brand # _____ No._____		Estimated Total		71297.00

[fol. 375]

NOTE: Standard Commercial weights on items listed above will be acceptable. If different from above, proposed weights and/or standard pack will be stated opposite each item.

SPECIAL PROVISIONS

A. CONTRACT PERIOD: Any contract resulting from this Invitation for Bids will cover the period 1 January 1962, or date of award if subsequent thereto, through and including 30 June 1962.

B. A minimum advance notice of twenty-four (24) hours will be given for requirements for the following day. Troop issue requirements will be delivered to Building 9070. Should any additional dining halls begin operation during the contract period, the contractor will deliver, at no increase in unit cost, to these added dining halls as directed by the Contracting Officer. Commissary resale requirements will be delivered to Building 9105.

NAME OF BIDDER OR CONTRACTOR

[redacted]

Standard Form 36
Nov. 1949 Edition

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960: 947508

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-103

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) [redacted]

PAGE NO. 5

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

C. Final inspection and acceptance of all items will be at destination.

D. Items listed herein will be delivered by refrigerated truck. Deliveries of resale items must arrive at the Commissary Sales Store between 7:00 A.M. and 9:00 A.M. Troop issue items will be delivered to the dining hall between 5:00 A.M. and 9:00 A.M. Prevailing base time will be used.

E. DISPENSER CABINETS: The Contractor will furnish, install and maintain for the period of this contract, three (3) each refrigerated milk dispenser cabinets with temperature indicator located on the outside of the cabinet. Each cabinet will hold three (3) five gallon cans. Two of the three dispensers will be installed in Building 9070, Eglin AF Auxiliary Field #9 (HURLBURT FIELD), and the third will be used at the missile site dining hall on Santa Rosa Island. (The Contractor will not be required to service the cabinet while at Santa Rosa Island). All milk dispenser cabinets and cans used in conjunction with this contract will be furnished in accordance with Military Standard Mil-Std-175, a copy of which is on file at the Base Veterinarian's Office, Bldg 9105, Eglin Air Force Auxiliary Field #9, Florida.
The Government will endeavor to prevent damage, breakage or loss of contractor-owned equipment while in its possession, and will assist in recovery of lost property where possible. However, the Government will not be held responsible or liable in any way for equipment which may become damaged or lost.

F. SPECIFICATIONS: Copies of Federal Specifications or other Government Specifications referred to herein may be obtained from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. Copies of all Federal or other Government Specifications referred to herein are on file and may be reviewed at the Base Procurement Office, Eglin AF Auxiliary Field #9, Florida.

G. CODE DATING: Bidder will be required to furnish code dating system utilized on all merchandise delivered.

H. Bidder will service refrigerated display cases in the Commissary Sales Store in the manner consistent with commercial practices.

I. EXCHANGE: The bidder agrees to pick up and exchange all stale, damaged or spoiled merchandise at no additional cost to the Government.

J. BUY AMERICAN CERTIFICATE: The bidder or offeror hereby certifies that each end product, except the end products excluded below, is a domestic source end product (as defined in the contract clause entitled "Buy American Act"); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

EXCLUDED ITEMS: _____

_____
(Bidder or Offeror)

NAME OF BIDDER OR CONTRACTOR

[redacted]

Standard Form 36
Nov. 1949 Edition

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960-[redacted]

278

[fol. 376]

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-105

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) [redacted] | PAGE NO. 6

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

K. REGISTRATION OF VEHICLES: Motor vehicles used for delivery of items listed herein will not be operated on Eglin AF Aux Fld #9, Florida, without being registered with the Base Provost Marshal section, and displaying either a permanent decal or temporary registration card.

L. AWARD: The Government reserves the right in making award on this Invitation for Bid to make award to the lowest aggregate total of any one bid.

M. INFORMATION: The buyer on this particular Invitation for Bid who may be contacted for further information is Mrs. Mabel Coldiron, telephone number 643106, Eglin AF Aux Fld #9, Florida.

N. BRAND NAME: The requirements contained in this contract are for specification type items, and notwithstanding anything to the contrary in the General Provisions, this contract is not to be construed to prevent the Government from procuring similar products of brand name for resale purposes from other sources.

O. CONTAINERS: Polyethylene, single-service, bulk milk packages (5 gal cap.) for bulk milk dispensers, may be substituted for stainless steel cans any time during any contract resulting from subject Invitation for Bid, at no increase in cost to the Government.

P. Paragraphs 3 and 4, Terms and Conditions of the Invitation for Bids, reverse of Standard Form 33, are deleted and replaced by:

LATE BIDS AND MODIFICATIONS OR WITHDRAWALS: Bids and modifications or withdrawals thereof received at the office designated in the Invitation for Bids after the exact time set for opening of the bids will not be considered, unless they are received before award is made and (i) are submitted by mail (or telegraph if authorized), and (ii) it is determined by the Government that late receipt was due solely to either (A) delay in the mails (or by the telegraph company if telegraphic bids are authorized) for which the bidder was not responsible or (B) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

Q. In the event of an inconsistency between provisions of this Invitation for Bids, the inconsistency shall be resolved by giving precedence in the following order: (1) the Schedule; (2) Terms and Conditions of the Invitation for Bids; (3) General Provisions; (4) other provisions of the contract, whether incorporated by reference or otherwise; (5) the Specifications.

R. AFFILIATED BIDDERS: (a) Business concerns are affiliates of each other when either directly or indirectly (i) one concern controls or has the power

[fol. 377]

NAME OF BIDDER OR CONTRACTOR

[redacted]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950: 547809

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

to control the other, or (ii) a third party controls or has the power to control both. (b) Each bidder shall submit with his bid an affidavit containing information as follows: (i) Whether the bidder has any affiliates; (ii) the names and addresses of all affiliates of the bidder; and (iii) the names and addresses of all persons and concerns exercising control or ownership of the bidder and any or all of his affiliates, and whether as common officers, directors, stockholders holding controlling interest, or otherwise. Failure to furnish such an affidavit may result in rejection of the bid.

S. CONTRACTOR'S STATEMENT OF CONTINGENT OR OTHER FEES FOR SOLICITING OR SECURING CONTRACTS: If the bidder, by checking the appropriate box provided therefor in his bid, has represented that he has employed or retained a company or person (other than a full-time bona fide employee working solely for the bidder-contractor) to solicit or secure this contract, or that he has paid or agreed to pay any fee, commission, percentage, or brokerage fee to any company or person contingent upon or resulting from the award of this contract, he may be requested by the contracting officer to furnish a completed Standard Form 119, "Contractor's Statement of Contingent or Other Fees" (December 1952 Ed.). If a bidder has previously furnished a completed Standard Form 119 (December 1952 Ed.) to the office issuing this invitation for bids (request for quotations), he may accompany his bid with a signed statement, (a) indicating when such completed form was previously furnished, (b) identifying by a number the previous invitation for bids or contract, if any, in connection with which such form was submitted, and (c) representing that the statement in such form is applicable to this bid.

T. BRAND NAME OR EQUAL: As used in this clause, the term "brand name" includes identification of supplies by make and model.

Certain supplies called for by this Invitation for Bids are identified in the schedule by a brand name "or equal" description. This identification is descriptive rather than restrictive. Bids offering "or equal" supplies will be considered for award if such supplies are clearly identified in the bids and are determined by the Government to be equal to the brand name supplies in all material respects.

Bidders must clearly indicate whether their bids are based on a brand name item or on an "equal" item by furnishing the information required below. IF THE BIDDER DOES NOT IDENTIFY THE BRAND NAME OR DESCRIBE IN FULL THE "OR EQUAL" ITEM WHICH IS OFFERED, AS PROVIDED IN (1) and (2) BELOW, THE BID WILL BE REJECTED.

(1) If the bidder proposes to furnish a brand name item specified in this Invitation for Bids, such brand name shall be inserted in the space provided after each item so described.

(2) If the bidder proposes to furnish an "or equal" item, the brand name of the item proposed to be furnished, if any, shall be inserted in the space provided after each item so described, and in addition, the following descriptive data must be furnished:

A full description thereof, including pertinent physical, mechanical, electrical, and chemical details and a statement explaining the differences

[fol. 378]

280

NAME OF BIDDER OR CONTRACTOR

POLAR ICE CREAM & CREAMERY COMPANY

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960: 847909

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-105

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) AF08(620)-406 [redacted]

PAGE NO. 8

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	between the item being offered and any one of the corresponding brand name items called for by this Invitation for Bids. (This information may be supplied by separate attachments to the Bid.)				
	U. CONTRACTUAL ATTACHMENTS: Standard Form 33; Terms and Conditions of the Invitation for Bid on reverse of Standard Form 33; Standard Form 36, pages 3, 4, 5, 6, 7 and 8; and General Provisions, Bakery and Dairy Products [illegible] tracts, (MCP 71-1032), 1 May 61, Clauses 1 thru 31.				

NAME OF BIDDER OR CONTRACTOR

POLAR ICE CREAM & CREAMERY COMPANY

[fol. 379]

AMENDMENT TO INVITATION FOR BIDS

PAGE NUMBER	NUMBER OF PAGES
1	4

AMENDMENT NO.	DATE AMENDMENT ISSUED
One (1)	17 November 1961

ISSUING OFFICE	IFB NO.
Base Procurement Office 4751st Air Defense Wing (Missile)(ADC) Eglin AF Auxiliary Field #9, Florida	08-620-62-11
	DATE IFB ISSUED 8 November 1961
	DATE AND HOUR OF OPENING 8 December 1961, 3:00 PM CST
ITEM Adding and changing Special Provisions	PURCHASE AUTHORIZATION AFT 2551-170-62

THE ABOVE IFB IS AMENDED AS FOLLOWS *(All Other Terms and Conditions Remain Unchanged)*:

(SEE ATTACHED PAGES)

THE BID OPENING DATE ☒ IS NOT EXTENDED: ☐ IS EXTENDED UNTIL _____ O'CLOCK

_____ A.M., _____ TIME _____ DATE

NOTICE TO BIDDERS

Bidders must acknowledge receipt of this Amendment prior to the hour and date set for bid opening, by one of the following methods:

a. By signing and returning three (3) copies of this Amendment.

b. By a notation acknowledging receipt of this Amendment on each copy of the bid submitted.

c. By separate letter or telegram which includes a reference to the IFB Number and Amendment Number.

Failure of your acknowledgement to be received at the issuing office prior to the hour and date fixed for opening of bids may result in the rejection of your bid. If, by virtue of this Amendment, it is desired to modify a bid already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Amendment and is received prior to the opening hour and date specified above.

FULL NAME OF BIDDER. (Type or Print)	SIGNATURE OF PERSON AUTHORIZED TO SIGN
Polar Ice Cream Concessions Co	J. F. W. Zirkelbach
ADDRESS 639 W Gregory St Pensacola Fla	TYPE OR PRINT SIGNER'S NAME AND TITLE Pres J. F. W. ZIRKELBACH, President

DD FORM DEC 58 1260

☆ U. S. GOVERNMENT PRINTING OFFICE 1960-600000

282
[fol. 380]

Standard Form 36 November 1949 Edition General Services Administration Fed. Proc. Reg. (41 CFR) 1-16.107 36-105	**CONTINUATION SHEET** (SUPPLY CONTRACT)	CONTRACT, ORDER, OR INVITATION NO. (As applicable) IFB 08-620-62-11	PAGE NO. 2

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

1. By adding Special Provision V. "Total Small Business Set-Aside" as follows:

V. NOTICE OF SMALL BUSINESS SET-ASIDE.

(a) Restriction. Bids or proposals under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns. This action is based on a determination by the contracting officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of government procurement is placed with small business concerns. Bids or proposals received from firms which are not small business concerns shall be considered nonresponsive.

(b) Definitions. (1) A "small business concern" is a concern that (i) is certified as a small business concern by the Small Business Administration, or (ii) is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs either not more than 500 employees or, if the concern qualifies as a labor surplus area concern, not more than 625 employees. In addition to meeting these criteria, a manufacturer or regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, it possessions, or Puerto Rico, by small business concerns: provided, that this additional requirement does not apply in connection with construction or service contracts.

(2) A "labor surplus area" is a geographical area which at the time of award is -- (i) classified by the Department of Labor as an "Area of Substantial Labor Surplus" or as an "Area of Substantial and Persistant Labor Surplus" and listed as such by that Department in conjunction with its bi-monthly publication "Area Labor Market Trends"; or (ii) not classified as in (i) above, but which is individually certified as an area of persistent or substantial labor surplus by the Department of Labor at the request of any prospective contractor.

(3) Labor surplus area concern includes--(i) persistent labor surplus area concerns which will perform or cause to be performed any contract awarded to them as labor surplus area concerns substantially in "Areas of Substantial and Persistent Labor Surplus"; and (ii) substantial labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial Labor Surplus."

A concern shall be deemed to perform a contract substantially in "Areas of Substantial and Persistent Labor Surplus" if the costs that it incurs on

[fol. 381]

NAME OF BIDDER OR CONTRACTOR	

Standard Form 36
Nov. 1949 Edition

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960: 647509

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

account of manufacturing or production (by itself or its subcontractors) in such areas amount to more than 50 percent of the contract price. A concern shall be deemed to perform a contract substantially in "Areas of Substantial Labor Surplus" if the costs that it incurs on account of manufacturing or production (by itself or its subcontractors) in such areas or in "Areas of Substantial or Persistent Labor Surplus" amount to more than 50 percent of the contract price.

(c) Agreement. The bidder agrees that, if awarded a contract as a small business concern for which he would not have qualified had he not also been a labor surplus area concern, he will perform the contract substantially in labor surplus areas as defined in (b) above.

2. By adding Special Provision W, "Examination of Records" as follows:

W. EXAMINATION OF RECORDS.

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor, involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in the clause excludes (i) purchase orders not exceeding $2,500 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

3. By adding Special Provision X, "Parent Company and Employer Identification Number" as follows:

X. PARENT COMPANY AND EMPLOYER IDENTIFICATION NUMBER.

(a) Bidder represents that he ☐ is, ☑ is not, owned or controlled by a parent company. For this purpose a parent company is defined as one which either owns or controls the activities and basic business policies of the bidder. To own another company means the parent company must own at least a majority (more than 50 percent) of the voting rights in that company.

NAME OF BIDDER OR CONTRACTOR

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960: 947899

Standard Form 36
November 1949 Edition
General Services Administration
Fed. Proc. Reg. (41 CFR) 1-16.107
36-105

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER, OR INVITATION NO. (As applicable): IFB 08-620-62-11

PAGE NO. 4

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT

To control another company such ownership is not required; if another company is able to formulate, determine or veto basic business policy decisions of the bidder such other company is considered the parent of the bidder. This control may be exercised through the use of dominant minority voting rights, use of proxy voting, contractual arrangements, or otherwise.

(b) If bidder is owned or controlled by a parent company, insert in the space below the name and main office address of the parent company.

Name _____ Address _____

(c) Bidder will provide in the applicable space below, if he has no parent company, his own Employer's Identification Number (E. I. No.) (Federal Social Security Identification Number used on Federal Tax Returns), or, if he has a parent company, the E. I. No. of his parent company.

Bidder's E. I. No. 59-0405980

Parent Company's E. I. No. _____

By deleting Special Provision F (SPECIFICATIONS) and adding the following in lieu thereof:

F. SPECIFICATIONS: Copies of Federal Specifications or other Government Specifications referred to herein may be obtained from General Services Administration, 50 Seventh Street, N. E., Atlanta, Georgia.

NAME OF BIDDER OR CONTRACTOR

[fol. 383]

GENERAL PROVISIONS
BAKERY AND DAIRY PRODUCTS
CONTRACTS

1. DEFINITIONS (Jan. 1958)

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. INSPECTION

All services, material and workmanship shall be subject to inspection and test by representatives of the Government. For this purpose, the Contractor shall allow at all reasonable times inspectors and other Government personnel free access to the plant and operations and shall furnish such facilities, supplies and services as may be required for this work.

3. RESPONSIBILITY FOR SUPPLIES (Jan. 1958)

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

4. PAYMENTS (Jan. 1958)

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

5. ASSIGNMENT OF CLAIMS (Jan. 1958)

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

6. DEFAULT (Jun 1958)

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services; provided, that the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (c) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government", and the rights and obligations of the parties hereto shall in such event be governed by such clause. (Except as otherwise provided in this contract, this paragraph (e) applies only if this contract contains such clause.)

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

7. DISPUTES (Jan. 1958)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

[fol. 287]

8. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT (Oct. 1958)

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any suit against the Government, or any claim against the Government made before suit has been instituted, or account of any alleged patent infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

9. BUY AMERICAN ACT (Jul. 1960)

(a) In acquiring end products, the Buy American Act (41 U.S.C. 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States [redacted] exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

10. CONVICT LABOR (Mar. 1949)

In connection with the performance of work under this contract, the Contractor agrees not not employ any person undergoing sentence of imprisonment at hard labor.

11. EIGHT-HOUR LAW OF 1912 - OVERTIME COMPENSATION (Jan. 1958)

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U.S.C. 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912, as amended, and to all other provisions and exceptions of said law.

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

12. WALSH-HEALY PUBLIC CONTRACTS ACT (Jan.1958)

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

13. NONDISCRIMINATION IN EMPLOYMENT

In connection with the performance of work under this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the non-discrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to Section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance; Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

14. OFFICIALS NOT TO BENEFIT (Jul. 1949)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

15. COVENANT AGAINST CONTINGENT FEES (Jan. 1958)

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

[fol. 3871]

For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

16. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (Jan. 1960)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the Government. If this contract is for supplies and is so terminated, the Contractor shall be compensated in accordance with ASPR Section VIII, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.

17. FEDERAL, STATE, AND LOCAL TAXES (Jan. 1958)

(a) As used throughout this clause, the term "tax inclusive date" means the date of negotiated contracts and the date set for the opening of bids for contracts entered into through formal advertising. As to additional supplies or services procured by modification to this contract, the term "tax inclusive date" means the date of such modification.

(b) Except as may be otherwise provided in this contract, the contract price includes all Federal, State, and local taxes and duties in effect and applicable to this contract on the tax inclusive date, except taxes (other than Federal transportation taxes) from which the Government, the Contractor, or the transactions or property covered by this contract are then exempt. Unless specifically excluded, duties are included in the contract price, and, if freight is included in the contract price, Federal transportation taxes are likewise included.

(c) (1) If the Contractor is required to pay or bear the burden -

(i) of any tax or duty, which either was not to be included in the contract price pursuant to the requirements of paragraph (b), or was specifically excluded from the contract price by a provision of this contract; or

(ii) of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price;

or of any interest or penalty thereon, the contract price shall be correspondingly increased; provided, that the Contractor warrants in writing that no amount for such tax, duty, or rate increase was included in the contract price as a contingency reserve or otherwise; and provided further that liability for such tax, duty, rate increase, interest, or penalty was not incurred through the fault or negligence of the Contractor or his failure to follow instructions of the Contracting Officer.

(2) If the Contractor is not required to pay or bear the burden, or obtains a refund or drawback, in whole or in part, of any tax, duty, interest, or penalty which (i) was to be included in the contract price pursuant to the requirements of paragraph (b), (ii) was included in the contract price, or (iii) was the basis of an increase in the contract price, the contract price shall be correspondingly decreased or the amount of such relief, refund, or drawback shall be paid to the Government, as directed by the Contracting Officer. The contract price also shall be correspondingly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden, or does not obtain a refund or drawback of any such tax, duty, interest, or penalty. Interest paid or credited to the Contractor incident to a refund of taxes shall insure to the benefit of the Government to the extent that such interest was earned after the Contractor was paid or reimbursed by the Government for such taxes.

(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this paragraph (c) shall set forth the amount thereof as a separate item and shall identify the particular tax involved.

(4) Nothing in this paragraph (c) shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes; Federal transportation taxes, except changes in the rate thereof, including repeal, pertaining to shipments from the Contractor to the Government; unemployment compensation taxes; or any State and local taxes, except those levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract, including gross income taxes, gross receipts taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipts from sales.

(5) No adjustment of less than $100 shall be made in the contract price pursuant to this paragraph.

(d) Unless there does not exist any reasonable basis to sustain an exemption, the Government agrees upon request of the Contractor, without further liability except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from (i) any Federal tax, which the Contractor warrants in writing was excluded from the contract price,

290 [fol. 388]

or (ii) any State or local tax; provided, that evidence appropriate to establish exemption from duties will be furnished, and Government bills of lading will be issued, only at the discretion of the Contracting Officer. In addition, the Contracting Officer may furnish evidence appropriate to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price.

(e) (1) The Contractor shall promptly notify the Contracting Officer of all matters pertaining to Federal, State, and local taxes and duties that reasonably may result in either an increase or decrease in the contract price.

(2) Whenever an increase or decrease in the contract price may be required under this clause, the Contractor shall take action as directed by the Contracting Officer, and the contract price shall be equitably adjusted to cover the costs of such action, including any interest, penalty, and reasonable attorneys' fees.

18. UTILIZATION OF SMALL BUSINESS CONCERNS (JAN 1958)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

19. GRATUITIES (MAR 1952)

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

20. VEHICLES OR CONVEYANCES (JUL 1955)

Vehicles or conveyances used in the transportation of items called for in this contract shall consist of clean, closed vehicles conforming to high standards of commercial transportation, equipped to protect against contamination of the product. These vehicles or conveyances shall be subject to examination at all times by the Contracting Officer or his authorized representative.

21. FEDERAL FOOD, DRUG, AND COSMETIC ACT (JUL 1955)

All deliveries shall comply with the provisions of the Federal Food, Drug, and Cosmetic Act, Public Law 717, 75th Congress, as amended.

22. SANITARY INSPECTION (JUL 1955)

(a) Award of items listed on this Invitation for Bids shall be made only to a bidder whose facilities at which such items are to be produced have been inspected or otherwise approved by an officer of the Air Force Veterinary Corps or the Army Veterinary Corps within 30 days prior to the opening date of this Invitation for Bids. In the event that the inspection reveals the existence of unsanitary conditions, the bidder shall be informed of such conditions in writing, by the Contracting Officer prior to award, and no award shall be made to that bidder unless the conditions are immediately corrected, reinspection requested, and on such reinspection the facilities are found satisfactory and approved.

(b) The Government reserves the right to inspect the Contractor's facilities at all reasonable times during the performance of this contract. If an inspection reveals the existence of unsanitary conditions, the Contractor shall be requested, in writing, by the Contracting Officer to correct such conditions. Refusal to correct unsanitary condition shall constitute sufficient cause for the Government to terminate this contract immediately in accordance with the clause hereof entitled "Default" and without

[fol. 389]

291

waiting ten days for the correction of the condition.

(c) Bidders may obtain sanitary inspection of their facilities by applying in writing to the Contracting Officer named herein not less than 10 calendar days prior to the opening date of this Invitation for Bids.

(d) The results of any sanitary inspection by the Department of the Air Force or the Department of the Army shall not be used for private sales promotion or advertising purposes.

23. PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES (MAR 1958)

The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused or produced in the United States, its possessions, or Puerto Rico; provided, that this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices; provided further, that nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed in the United States, its possessions, or Puerto Rico.

24. RENEGOTIATION (OCT 1959)

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in section 103g of the Renegotiation Act of 1951, as amended.

25. ESTIMATED REQUIREMENTS

(a) The quantities of supplies and services which the Government estimates that the Government activity named in the Schedule will require during the period covered by this contract are set forth in the Schedule. These quantities are estimated only and are not purchased hereby.

(b) The Government agrees to call on the Contractor for all the requirements for such supplies and services of the Government activity named in the Schedule. The Contractor agrees to furnish such supplies and services when called for by the Government.

(c) In the event that the requirements of the Government activity named in the Schedule for the supplies and services described herein do not materialize in the quantities specified as either "estimated" or "maximum" in the Schedule, such failure shall not constitute grounds for equitable adjustment under this contract, except as may be specifically provided in the Schedule.

26. APPROVAL OF CONTRACT

(This provision will apply only if the amount of this contract is in excess of $ 20,000.00).

This contract shall be subject to the written approval of the Secretary of the Air Force or his duly authorized representative and shall not be binding until so approved.

27. MILK BOTTLES (APR 1957)

(a) If the contract is for the delivery of milk in bottles, except where the purpose of the procurement is to obtain milk for resale, insert the following clause:

When milk is delivered in glass bottles, the cost of the bottle shall not be included in the price of the milk, and the bottles shall remain the property of the contractor. The Government will endeavor to prevent undue breakage or loss of bottles while in its possession; however, the Government shall not be held responsible or liable in any way for any bottles which may become broken or lost.

(b) If the purpose of the procurement is to procure milk for commissary resale, insert the following clause:

MILK BOTTLES (MAR 1959)

The unit price of the glass containers furnished by the Contractor for the delivery of milk hereunder shall be set forth separately in the Schedule. The contractor shall bill the Government for the price of the product delivered plus the price of the glass containers. The contractor shall pick up the reuseable glass containers at the Commissary Store periodically at the request of the Commissary Officer, and shall refund to the Government in cash, or check payable to the Commissary Officer, the aggregate value of the picked up reuseable containers. This value shall be computed at the respective unit container prices specified in the Schedule.

1 Jul 1961 292

28. LABORATORY ANALYSIS (APR 1957)

(This clause will apply only if this contract is for delivery of milk, milk products or ice cream).

(a) During the life of the contract a Government inspector will draw samples from not less than three shipments during each monthly period for laboratory analysis. If such analysis reveals a percentage of butterfat below that specified elsewhere in this contract, the weighted average butterfat percentage of the lots from which the samples were drawn shall be ascertained on the basis of the percentage in the samples, and all products delivered during the month shall be deemed to have contained the average percentage of butterfat so ascertained.

(b) If the average butterfat content so determined is below contract requirements, the price per unit paid to the Contractor for that month shall be in the same ratio to the contract price per unit as the average butterfat content so delivered. No payment over the contract unit price will be made for any delivery of products containing more than the required percentage of butterfat, as stated in the contract.

(c) The foregoing is an agreed formula for adjustment of prices for accepted products which might have been rejected, and is without prejudice to the Government's right to terminate for default or to pursue any other remedy under this contract or provided by law.

29. WEIGHT OF CONTAINERS (APR 1957)

(This clause will apply only if this contract is for delivery of milk, milk products or ice cream).

The average tare weight of cans, lids, tubes and seals, as a complete unit, will be determined by the contractor prior to the beginning of the milk contract. This tare weight will be furnished the inspector by the contractor as a certification on the shipping document, copy of which will be supplied inspector. The verification of contractor's tare weight will be the responsibility of the inspector. In the event contractor utilizes cans of different weights (different manufacturer or repainted) in a single delivery, it will be his responsibility to furnish the inspector average unit tare weight for each group identifying features of each group and certification of different group tares. In determining the net weight, milk will be considered to weight 8.6 lbs per gallon.

30. CONTAINERS (APR 1957)

(This clause will apply only if contract is for bakery products).

Delivery shall be made in suitable containers which shall not be included in the contract price. The contractor shall be required to pick up his containers. The Government will not be responsible for any loss or damage to the containers.

31. ALTERATIONS IN CONTRACT

The following alterations have been made in the provisions of this contract.

A. Clause 22, Paragraphs (a) and (c) only are applicable to this contract.

[fol. 392]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

PLAINTIFF'S EXHIBIT 3

HEADQUARTERS
NAVAL AIR BASIC TRAINING COMMAND
U. S. NAVAL AIR STATION
PENSACOLA, FLORIDA

IN REPLY REFER TO
Code 04

9 MAR 1962

Mr. Joe J. Harrell
Attorney at Law
Florida National Bank Building
Pensacola, Florida

Dear Mr. Harrell:

This is in response to your informal request of March 8, 1962, for information regarding the status of the political jurisdiction exercised by the United States over lands comprising the U. S. Naval Air Station, Pensacola, Florida.

Information contained in the records maintained at this Headquarters shows that the United States obtained jurisdiction over the lands in question pursuant to an Act of Florida, approved July 24, 1845. Briefly, that Act authorized the United States to acquire, hold, and own land in the State of Florida for certain purposes, and further authorized the Governor to cede to the United States exclusive jurisdiction over lands so acquired, subject to the right of the State and its political subdivisions to serve their civil and criminal processes upon such lands. Pursuant to the Act described above, the Governor of the State of Florida executed a deed of jurisdiction to the United States on October 13, 1856. It is well established that a reservation of the right to serve civil and criminal process is not inconsistent with a grant of exclusive jurisdiction to the Federal Government.

It is trusted that the information set forth above will be found satisfactory for your purposes. I shall be most pleased to provide you with any further information available in this regard that you may require.

Sincerely yours,

/s/ M. H. TUTTLE
M. H. TUTTLE
Rear Admiral, U. S. Navy

[fol. 393]
(Letterhead of U. S. Army Engineer District, Savannah, Georgia)

1 March 1962

SASVR

Mr. Joe Harrell
P. O. Box 732
Pensacola, Florida

Dear Mr. Harrell:

Reference is made to your telephonic inquiry as to the status of jurisdiction for the Fort Benning Military Reservation.

The United States has exclusive jurisdiction over this installation. In connection with the Georgia portion of the Reservation, exclusive jurisdiction was ceded pursuant to Sections 1-3 of Act No. 373 of the General Assembly of Georgia approved 23 August 1927 (Laws of Georgia 1927, page 352) and Act Number 851 of the General Assembly of Georgia approved 15 February 1952 (Laws of Georgia of 1952, page 264).

In connection with the Alabama portion of the Reservation, exclusive jurisdiction was obtained by Deed of Cession executed by the Governor of Alabama on 26 September 1945 and by letter of acceptance of jurisdiction dated 7 November 1945.

Sincerely yours,

/s/ ALBERT D. WOODLE, JR.
ALBERT D. WOODLE, JR.
Chief, Real Estate Division

[fol. 394]
(Letterhead of State of Florida, Executive Department, Tallahassee, Florida)

December 4, 1952

Honorable R. A. Gray
Secretary of State
Tallahassee, Florida

Re: Deed of Cession, Dated January 7, 1943, Ceding exclusive jurisdiction to the United States of America over 26,695.17 acres of land, more or less, in Bay County, Florida, said land being used for Military purposes in connection with Tyndall Field.

Dear Mr. Gray:

I transmit to you the attached letter, dated February 1, 1943, addressed to Honorable Spessard L. Holland, Governor of Florida, which was received in the Governor's Office on February 6, 1943, from Honorable Henry L. Stimson, Secretary of War, Washington, D. C.

The purpose of the said letter was to give notice that the United States accepted the Cession of jurisdiction, effective as of the 15th day of February, 1943, at 12:00 noon, covering subject acreage in Bay County, Florida, for use in connection with Tyndall Field.

Very truly yours,

/s/ C. L. Clark
Executive Assistant

CLC/awb
CC:
Honorable George Earl Hoffman
United States Attorney
Pensacola, Florida

[fol. 395]

WAR DEPARTMENT

WASHINGTON

FEB 1 1943

[Stamp—Received Feb 6 1943—Governor's Office—Tallahassee, Florida]

Honorable Spessard L. Holland,
Governor of Florida,
Tallahassee, Florida.

Dear Governor Holland:

The War Department acknowledges receipt of a deed dated January 7, 1943, executed by you on behalf of the State of Florida, ceding exclusive jurisdiction to the United States of America over 26,695.17 acres of land, more or less, in Bay County, Florida. The land is being used for military purposes in connection with Tyndall Field.

Notice is hereby given that the United States accepts this cession of jurisdiction, effective as of the 15th day of February, 1943, at 12:00 noon.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

2/6/43 /s/ HENRY L. STIMSON
Secretary of War.

[fol. 396]

HEADQUARTERS
TYNDALL AIR FORCE BASE
and
4756th AIR BASE GROUP (ADC)
UNITED STATES AIR FORCE
TYNDALL AIR FORCE BASE, FLORIDA
OFFICE OF THE STAFF JUDGE ADVOCATE

REPLY TO ATTN OF: ABJA

8 March 1962

SUBJECT: Jurisdiction

To:

Jones and Harrell
Attn: Mr. Joe J. Harrell
Florida National Bank Building
Pensacola, Florida

1. This will acknowledge receipt of your letter of 7 March 1962 regarding jurisdiction over Tyndall Air Force Base reservation.

2. We are this date forwarding the desired documents to the United States Attorney in Pensacola, Florida. If you wish to contact him, he will have subject information available in his office.

Sincerely yours,

/s/ MILTON LEON
MILTON LEON
Major, USAF
Staff Judge Advocate

[fol. 397]

Deed of Cession

Know All Men By These Presents:

Whereas, the United States of America has acquired all those tracts or parcels of land situate and lying in the County of Okaloosa, State of Florida, described as follows, to wit:

The SW¼ of the NW¼ of Section 19, Township 1 south, Range 22 West, except a piece 75 feet east and west by 150 feet north and south, more particularly described as follows:

From the SE corner of the SW¼ of the NW¼ thence North 175 feet, thence West 172 feet to point of beginning; thence West 75 feet, thence North 150 feet, thence East 75 feet, thence South 150 feet to point of beginning.

And also except a piece 75 feet East and West by 150 feet North and South, more particularly described as follows:

From the NE. corner of the SW¼ of the N. W.¼ thence South 145 feet, thence West 165 feet to point of beginning; thence West 75 feet, thence South 150 feet, thence East 75 feet, thence North 150 feet to point of beginning.

And the W½ of the S.W.¼, and the fractional part of the E½ of SW¼ lying South of Magnolia Bay (Weekly Bayou), of Section 19; the fractional N½ of Section 30 except a certain piece of land described as follows—beginning at a point 2200 feet east of the NW corner of Section 30, thence South 628 feet, thence East 2210.8 feet more or less, to the West shore of Choctawhatchee (Valparaiso) Bay, thence northerly along the shore of Choctawahatchee (Valparaso) Bay, to the section line dividing sections 19 and 30, thence West 2580 feet more or less to point of beginning, all in Township 1 South, Range 22 West. Also [fol. 398] the W½ of the SE¼ and the W½ of Section 13; all of Section 24 except the NE¼ of the NE¼ and except the right-of-way granted the State Road Department for Florida State Highway Number 10; also the N½ of NE¼ and the NE¼ of the NW¼, Section 25, Township 1 South,

Range 23 West in Okaloosa County, consisting of approximately 1460 acres.

WHEREAS, said lands have been acquired and will be used for the site *of forts, magazines, arsenals, dock yards and* other needful Federal Buildings for the United States; and

WHEREAS, application in writing has been made by the said United States to me, Fred P. Cone, Governor of the State of Florida, to cede to the said United States jurisdiction over said lands.

NOW, THEREFORE, I, Fred P. Cone, Governor of the State of Florida, in the name and by the authority of said State and pursuant to the statutes of said State in such cases made and provided, do hereby cede to the United States of America, exclusive jurisdiction over said lands so acquired;

PROVIDED, HOWEVER, that said cession of jurisdiction is made upon the express condition that the said State of Florida retain and shall have concurrent jurisdiction with the United States in and over said lands and every portion thereof so far that all process, civil or criminal, issuing under authority of said State of Florida, or of any of the Courts or judicial officers thereof, may be executed by the proper officer thereof, upon any person or persons amenable to the same, within the limits and extent of said lands in like manner and like effect as if said statutes of the State [fol. 399] of Florida had never been passed and this instrument had never been executed; saving, however, to the United States security to their property within said limits and extent and exemption of the same and of said lands from any taxation under authority of the State of Florida while the same shall continue to be owned and occupied by the United States for the purposes above expressed and not otherwise, and provided further, that this cession is made and shall in all things, be subject to the terms and effect of the statutes of the State of Florida in such cases made and provided the same as if such statutes were herein fully set forth.

In Testimony Whereof, I, Fred P. Cone, Governor of the State of Florida, have hereunto set my hand and caused this instrument to be countersigned by the Secretary of State and sealed with the Great Seal of the State of Florida, at the Capitol, at Tallahassee, this 26th day of April, in the year of our Lord, One Thousand Nine Hundred and Thirty-seven.

(Seal)

/s/ FRED P. CONE

Governor of the State of Florida

Attest:

/s/ R. A. GRAY
Secretary of State of
the State of Florida.

[fol. 400]

STATE OF FLORIDA

(Emblem)

Office of Secretary of State.

I, R. A. Gray, Secretary of State of the State of Florida, do hereby certify that the above and foregoing is a true and correct copy of Deed of Cession of certain lands situated in the County of Okaloosa, State of Florida, recorded on the twenty-sixth day of April, A. D., 1937, Deed Book ONE, Pages 349-351, as disclosed by the records of this office.

Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the TWENTIETH day of JULY A. D. 1953.

(Seal)

/s/ R. A. GRAY
Secretary of State

[fol. 401]

DEED

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, the following described lands, within the limits of the County of Okaloosa, State of Florida, some of which were withdrawn by the United States from the public lands and reserved for the use of the War Department by an act of Congress approved June 27, 1940 (54 Stat. 628, 655) and the remainder of which were acquired by purchase and condemnation, are now being held by the United States of America for the purpose of erecting and maintaining thereon forts, magazines, arsenal, dockyards and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States, to-wit:

All those certain lands situated in the County of Okaloosa, State of Florida, more fully described as follows:

IN OKALOOSA COUNTY

A certain tract or parcel of land containing 17,925 acres, more or less, lying and being in Sections 30 and 31, Township 1 South, Range 22 West, Sections 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, Township 1 South, Range 23 West and Sections 12, 13, 24 and 25, Township 1 South, Range 24 West, Tallahassee Meridian, Okaloosa County, Florida, and being more particularly described as follows:

Beginning at the Northwest Corner of Section 12, T1S, R24W; thence S89°19′E 5380 feet, more or less, to the Northeast corner of said Section; thence S88°44′E 5294 feet, more or less, to the Northeast Corner of Section 7, T1S, R23W; thence S89°03′E 5335 feet, more or less, to the Northeast Corner of Section 8, T1S, R23W; thence S88°32′E 5308 feet, more or less, to the Northeast Corner of Section 9, T1S, R23W; thence S88°39′E 5337 feet, more or less, to the Northeast Corner of Section 10, T1S, R23W; thence S88°27′E 5310 feet, more or less, to the Northeast Corner of Section 11, T1S, R23W, thence S0°45′W 5311 feet to the Southeast Corner of said Section 11; thence S1°27′W 5373 feet, more or less, to the Southeast corner

of Section 14, T1S, R23W; thence S0°23′W 5340 feet, more or less, to the Southeast Corner of said Section 23; thence S89°02′E 1327 feet to the Northeast corner of NW¼ of NW¼ of said Section 25; thence S1°03′W along the East line of said NW¼ of NW¼ 1328 feet, more or less, to the Southeast corner of said NW¼ of NW¼; thence S88°54′E along the North line of the SE¼ of NW¼ and S½ of NE¼ of said Sec. 25 3996 feet to the Northeast corner of said S½ of NE¼; thence S00°42′W along the West line of Sec. 30, T1S, R22W, 1337 feet, more less, to the Northwest corner of Lot 4 of said Sec. 30; thence easterly along the North line of Lots 4 and 5 of [fol. 402] said Sec. 30, 3465 feet, more or less, to a point of the North shore line of Choctowhatchee Bay; thence Southwesterly along said North shore line in said Sec. 30 to the meander corner of Secs. 30 and 31, T1S, R22W, which bears S51°W 4286 feet, more or less; thence Southwesterly along the meanders of said North shore in said Sec. 31 to the meander corner of Secs. 31 and 36, T1S, R22 and 23W, which bears S38°45′W 243 feet more or less; thence Southwesterly along the meanders of said North shore in said Sec. 36 to the meander corner of Secs. 35 and 36, T1S, R23W, which bears S71°06′W 5696 feet; thence Northwesterly along the meanders of said North shore in said Sec. 35 to the meander corner of Secs. 34 and 35, T1S, R23W, which bears N86°03′W 5367 feet; thence Southwesterly along the meanders of said North shore in said Sec. 34 to the meander corner of Secs. 3 and 34, Twps 1 and 2 S, R23W, which bears S58°07′W 6006 feet; thence N88°45′W along the South line of said Sec. 34, 383 feet, more or less, to the Southwest corner of said Sec. 34; thence N88°45′W along the South line of Sec. 33, T1S, R23W, 5281 feet, more or less, to the Southwest corner of said Sec. 33; thence N88°45′W along the South line of Sec. 32, T1S, R23W, 4833 feet, more or less, to the West right of way line of U. S. Highway 85; thence along said West right of way line of Highway N26°26′E 364.9 feet; thence N55°23′W 100.3 feet to the shore line of Garnier's Bayou; thence Northerly along said shore line to a point which bears S32°E 1375 feet from the North-

west corner of said Section 32; thence N1°12′E 276 feet; thence N88°58′W 772.3 feet to a point on the West line of Section 32, 895.1 feet S01°12′W of the Northwest corner of said Sec. 32; thence N88°58′W 2635.1 feet to a point on the west line of Lot 2 of Sec. 31, T1S, R23W; thence N1°11′E 895.1 feet, more or less, to the Northwest corner of said Lot 2 Section 31; thence S88°57′E along the North line of said Sec. 31, 1318 feet, more or less, to the Northeast corner of said Lot 2; thence Northerly along the West line of Lot 4 of Sec. 30, T1S, R23W, 1330 feet, more or less, to the Northwest corner of the S½ of said Lot 4; thence easterly along the North line of said S½ of Lot 4 1318 feet, more or less, to Northeast corner of said S½ of Lot 4, thence N00°56′E along the East line of said Sec. 30 1329 feet, more or less, to the Southeast corner of Lot 1 of said Sec. 30; thence N88°35′W along the South line of said Lot 1 3026 feet to a point on the East shore of Garnier's Bayou; thence northeasterly and southwesterly along the meanders of the East and West shores of said Bayou in said Sec. 30 to the meander corner of Secs. 25 and 30; T1S, R23 and 24W, [fol. 403] which bears S48°48′W, 3067 feet; thence southwesterly along the meanders of said West shore in said Sec. 25 to the meander corner of Secs. 25 and 36, T1S, R24W, which bears S26°15′W, 704.2 feet; thence N88°39′W along the South line of said Sec. 25, 2340 feet, more or less, to the Southeast corner of Lot 6 of said Sec. 25; thence northerly along the East line of said Lot 6 2657 feet, more or less, to the Northeast corner of said Lot 6, thence westerly along the north line of Lots 6 and 5 of said Sec. 25, 2666 feet, more or less, to the Northwest corner of said Lot 5; thence N0°40′E 2658 feet, more or less, to the Northwest corner of said Sec. 25; thence N1°03′E 5311 feet, more or less, to the Northwest corner of Sec. 24, T1S, R24W, thence N0°36′E 5328 feet, more or less, to the Northwest corner of Sec. 13, T1S, R24W; thence N1°02′E 5292 feet, more or less, to the point of beginning.

And that portion of the right of way for a certain road formerly known as State Highway Number 10, lying within the West ¾ of Section 24, T1S, R23W, containing 10 acres, more or less, and being that portion of said right of way

excepted from the land included in a Deed of Cession executed the 26 day of April 1937 and recorded in the Office of the Secretary of State of the State of Florida on the 27 day of April 1937.

LESS AND EXCEPT the lands containing 78 acres, more or less, comprising a Right-of-Way for Florida State Highway No. 85 (formerly Florida State Highway No. 10) said Right-of-Way being 100 feet wide, lying 50 feet on each side of the center line described as follows:

Beginning at a point on the center line of said highway and on the South line of Sec. 32, T1S, R23W, said point being 504 feet, more or less, Easterly from the Southwest corner of said Sec. 32; thence Northeasterly along the center line of said highway along a curve to the right, having a radius of 11,459.19 feet, a distance of 5451.3 feet, the long chord of which bears N39°41'E 5400.7 feet to the point of reverse curve; thence along the center line of said highway along a curve to the left, having a radius of 2864.93 feet, a distance of 2597.9 feet, the long chord of which bears N27°20'E 2510.0 feet to the point of tangency; thence along the centerline of said highway N01°22'E 6,182 feet to the point of a curve; thence along the center line of said highway along a curve to the right, having a radius of 2864.93 feet, a distance of 3018.3 feet, the long chord of which bears N31°33'E 2,880.8 feet to the point of tangency; thence along the center line of said highway N61°44'E 12,219 feet to the point of a curve; thence along the center line of said highway along a curve to the left, having a radius of 2864.93 feet, a distance of 598.3 feet, the long chord of which bears [fol. 404] N55°45'E 597.3 feet to the point of tangency; thence along the center line of said highway N49°46'E 2050 feet to the point of a curve; thence along the center line of said highway along a curve to the right, having a radius of 2864.93 feet, a distance of 2062.4 feet, the long chord of which bears N70°23'E 2018 feet to a point on the East line of Sec. 11, T1S, R23W, 2736 feet, more or less, Southerly from the Northeast corner of said Section 11.

LESS AND EXCEPT the land comprising a Right-of-Way for a County Road containing 10.06 acres, more or less, and described as follows:

From the Northeast corner of Lot 4, Sec. 30, T1S, R23W, S0°56'W along the section line a distance of 1133.06 feet to the point of beginning; thence go S47°23'E a distance 4416.5 feet, more or less, to the northwest boundary of the right-of-way of Florida State Highway No. 85; thence S42°37'W along said right-of-way a distance of 100 feet; thence go N47°23'W a distance of 4327.5 feet, more or less, to the intersection with the east boundary of Lot 4, Sec. 30, T1S, R23W; thence N0°56'E along the section line a distance of 133.90 feet to the point of beginning; all containing approximately 10.06 acres; approximately 4 miles west of Eglin Field Main Base and approximately 5 miles Northeast of Fort Walton, Florida.

The land herein described contains 17,847 acres, more or less, net after deductions and is shown on map attached hereto and made a part hereof.

And Whereas, application in writing has been made by the United States of America to me, Fuller Warren, Governor of the State of Florida, to cede to said United States of America exclusive jurisdiction over said lands:

Now, Therefore, I, Fuller Warren, Governor of the State of Florida, in the name and by the authority of said State, and pursuant to the statutes of said State in such cases made and provided, do hereby cede to the United States of America, exclusive jurisdiction over lands so held:

Provided, However, that said cession of jurisdiction is made upon the express condition that the said State of Florida retains and shall have concurrent jurisdiction with the United States in and over said lands and every portion thereof so far that all process, civil or criminal, issuing under authority of the State of Florida, or any of the courts or judicial officers thereof, may be executed by the proper officer thereof upon any person or persons amenable to the [fol. 405] same, within the limit and extent of said lands in like manner and like effect as if said statutes of the State of Florida had never been passed and this instrument had never been executed; saving, however, to the United States security to their property within said limits and extent,

and exemption of the same from any taxation under laws of the State while the same shall continue to be owned and occupied by the United States for the purposes above expressed and not otherwise, and provided, further, that this cession is made and shall in all things be subject to the terms and effect of the statutes of the State of Florida in such cases made and provided, the same as if such statutes were herein fully set forth.

IN TESTIMONY WHEREOF, I, Fuller Warren, Governor of the State of Florida, have hereunto set my hand and caused this instrument to be countersigned by the Secretary of State and sealed with the Great Seal of the State of Florida, at the Capitol, at Tallahassee, this 12 day of Jan., in the year of our Lord, One Thousand Nine Hundred and Fifty-One.

FULLER WARREN
Governor of the State of Florida

(Seal)

ATTEST:

R. A. GRAY
Secretary of State
of the State of Florida

STATE OF FLORIDA)
OFFICE OF) ss
SECRETARY OF STATE)

I, R. A. Gray, Secretary of State of the State of Florida, do hereby certify that the foregoing Deed of Cession has been duly recorded in this office in Deed Book B, pages 220-21-22-23-24.

GIVEN under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capitol, this 12 day of Jan., A.D., 1951.

(Seal)

R. A. GRAY
Secretary of State

[fol. 406] And Whereas, appliction in writing has been made by the United States of America to me, Fuller Warren, Governor of the State of Florida, to cede to said United States of America exclusive jurisdiction over said lands:

Now, Therefore, I, Fuller Warren, Governor of the State of Florida, in the name and by the authority of said State, and pursuant to the statutes of said State in such cases made and provided, do hereby cede to the United States of America, exclusive jurisdiction over said lands so held:

Provided, However, that said cession of jurisdiction is made upon the express condition that the said State of Florida retains and shall have concurrent jurisdiction with the United States in and over said lands and every portion thereof so far that all process, civil or criminal, issuing under authority of the State of Florida, or any of the courts or judicial officers thereof, may be executed by the proper officer thereof upon any person or persons amenable to the same, within the limits and extent of said lands in like manner and like effect as if said statutes of the State of Florida had never been passed and this instrument had never been executed; saving, however, to the United States security to their property within said limits and extent, and exemption of the same from any taxation under laws of the State while the same shall continue to be owned and occupied by the United States for the purposes above expressed and not otherwise, and provided, further, that this cession is made and shall in all things be subject to the terms and effect of the statutes of the State of Florida in such cases made and provided, the same as if such statutes were herein fully set forth.

In Testimony Whereof, I, Fuller Warren, Governor of the State of Florida, have hereunto set my hand and caused this instrument to be countersigned by the Secretary of State and sealed with the Great Seal of the State of Florida,

at the Capitol, at Tallahassee, this 12 day of Jan., in the year of our Lord, One Thousand Nine Hundred and Fifty-One.

/s/ FULLER WARREN
Governor of the State of Florida

(Seal)

ATTEST:

/s/ R. A. GRAY
Secretary of State
of the State of Florida

[fol. 407]

STATE OF FLORIDA

(Emblem)

Office of Secretary of State.

I, R. A. GRAY, Secretary of State of the State of Florida, do hereby certify that the above and foregoing is a true and correct photographic copy of Deed of Cession of a tract of land situated in the County of Okaloosa, State of Florida, known as Eglin Field, as filed in this office and recorded on the Twelfth day of January, A. D., 1951 in Deed of Cession Book B, pages 220-224, as disclosed by the records of this office.

(Seal) Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the Ninth day of October, A.D. 1952

/s/ R. A. GRAY
Secretary of State

[fol. 408]

LAW OFFICES OF
JONES AND HARRELL
FLORIDA NATIONAL BANK BUILDING
PENSACOLA, FLORIDA

J. MCHENRY JONES
JOE J. HARRELL
W. H. F. WILTSHIRE

HE 2-7604

May 3, 1962

Honorable William Logan Hill
United States District Clerk
Federal Building
Pensacola, Florida

Re: Polar Ice Cream & Creamery Company
vs. Florida Milk Commission

Dear Mr. Hill:

Enclosed herewith is the original Exhibit #3 in the above styled case, together with supplemental materials which we have obtained in accordance with the permission granted us by the Court, and also a photostatic copy of a letter which we have received from Mallory E. Horne, Esquire, indicating that in accordance with the Court's direction, we first forwarded the documents to him for his inspection.

We would appreciate it if you would forward all of these items to the Clerk, so that they may be replaced in the Court file as an exhibit in this Cause.

With kindest regards,

Yours sincerely,

/s/ JOE J. HARRELL
Joe J. Harrell

JJH:bb
Encls.

[fol. 409]
[Stamp—Filed May 4, 1962—Office of Clerk—U. S. Dist. Court—North, Dist. Fla.]

LAW OFFICES
HORNE AND RHODES
TALLAHASSEE, FLORIDA

April 30, 1962

MALLORY E. HORNE
ROY T. RHODES

P. O. Box 226
TELEPHONE 223-0593

MARION D. LAMB, JR.

Honorable Joe J. Harrell
Jones and Harrell
Florida National Bank Building
Pensacola, Florida

Re: Polar Ice Cream vs.
Florida Milk Commission

Dear Joe:

I have examined the documents related by and enclosed with yours of April 24th.

They are in order and I have no objection to your filing them as a supplement to your Exhibit No. 3.

With kindest regards, I am,

Sincerely,

/s/ MALLORY E. HORNE
Mallory E. Horne

MEH:bjk
Encls.

[fol. 410]
[Stamp—Filed May 4, 1962—Office of Clerk—U. S. Dist. Court--North, Dist. Fla.]

STATE OF FLORIDA)
:
COUNTY OF ESCAMBIA)

Before the undersigned authority this day personally appeared JOE J. HARRELL, who, after being by me first duly sworn, deposes and says that there is a certified copy of a Deed of Cession, certified March, 1937, and certified by Claude R. Swanson, Secretary of Navy, in the Office of the Clerk of the United States District Court, Pensacola, Florida, in the file entitled, "Government Reservation". The deed was dated October 13, 1856, and was from James E. Broome, Governor of the State of Florida, to the United States of America.

/s/ JOE J. HARRELL
Joe J. Harrell

SWORN TO AND SUBSCRIBED before me this 24th day of April, 1962.

(Seal)

/s/ ELIZABETH B. BUCHANAN
Notary Public

My Commission Expires: 7-14-64

[fol. 411] Transmittal letter, dated December 4, 1952. Omitted. Printed side folio 394, page 296, ante.

[fol. 412] Secretary of War's letter to Governor Holland of Florida, dated February 1, 1943. Omitted. Printed side folio 395, page 297, ante.

[fol. 413]

STATE OF FLORIDA

(Emblem)

Office of Secretary of State.

I, Tom Adams, Secretary of State of the State of Florida, do hereby certify that the above and foregoing are true and correct copies of a letter dated December 4, 1952 from Mr. E. C. Clark, Executive Assistant to Governor Fuller Warren and a letter of acceptance dated February 1, 1943 from Honorable Henry L. Stimson, Secretary of War, Washington, D. C. whereby the United States accepted the Cession of Jurisdiction covering certain lands in Bay County to be used in connection with Tyndall Field as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the 3rd day of April A. D. 1962.

(Seal)

/s/ TOM ADAMS
Secretary of State

[fol. 414]
[Stamp—Filed May 4, 1962—Office of Clerk—U. S. Dist. Court—North, Dist. Fla.]

STATE OF GEORGIA

(Emblem)

Office of Secretary of State

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify that the two pages of photographed matter hereto attached contain a true and correct copy of Act No. 851 (Senate Bill No. 265) approved by the Governor on February 15, 1952, entitled "STATE JURISDICTION OVER CEDED TERRITORY" as the same appears in Georgia Laws 1952, Vol. I, pages 264-265 and is of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 2nd day of April, in the year of our Lord One Thousand Nine Hundred and Sixty-two and of the Independence of the United States of America the One Hundred and Eighty-Sixth.

(Seal)

/s/ BEN W. FORTSON, JR.
Secretary of State.

[fol. 415]

No. 851 (Senate Bill No. 265)

(See opposite) ☞

STATE JURISDICTION OVER CEDED TERRITORY.

Code § 15-302 Amended.

No. 851 (Senate Bill No. 265).

An Act to amend Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United States over certain lands in this State so as to provide that the State shall no longer retain its civil and criminal jurisdiction over persons and citizens of any ceded territory used by the Department of Defense; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia as follows:

Section 1. Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United States over certain lands in this State is amended by inserting after the word "State" at the end of the second sentence thereof of the words "except as to any ceded territory owned by the United States and used by the Department of Defense but the State retains jurisdiction over the regulation of public utility services in any ceded territory," so that said Section when so amended shall read as follows:

"15-302. Exclusive jurisdiction in and over any lands so acquired by the United States is hereby ceded to the United States for all purposes except service upon such lands of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. The State retains its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State, except as to any ceded territory owned by the United States and used by the Department of Defense, but the State retains jurisdiction over the regulation of public utility services in any ceded territory. Nothing herein shall interfere with the jurisdiction of the United States over any matter or subjects set out

in the Acts of Congress donating money for the erection of public buildings for the transaction of its business in this State, or with any laws, rules, or regulations that Congress may adopt for the preservation and protection of its property and rights in said ceded territory, and the proper maintenance of good order therein."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 15, 1952.

HOMESTEAD EXEMPTIONS.

Code § 92-233 Amended.

No. 852 (House Bill No. 653).

An Act to amend Section 92-233 of the Annotated Supplement of the 1933 Code of Georgia, which supplement provides for the definition of the word "homestead" as used in figuring ad valorem taxes, so as to provide for the inclusion of the permanent place of residence of a person in the armed forces of the United States; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia as follows:

Section 1. Paragraph (k) of Section 92-233 of the Annotated Supplement of the 1933 Code of Georgia, relating to the inclusion within the definition of "homestead" of the place of residence of the person in the armed forces, is amended by striking therefrom the words "for the duration of the war in which the United States is now engaged" in lines 4 and 5 thereof, so that said paragraph (k) when so amended shall read as follows: Code § 92-233 amended.

"(k) The permanent place of residence of a person in "Homestead".

[fol. 417]
[Stamp—Filed May 4, 1962—Office of Clerk—U. S. Dist. Court—North, Dist. Fla.]

STATE OF GEORGIA

(Emblem)

Office of Secretary of State

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify, that the two pages of photographed matter hereto attached contain a true and correct copy of Act No. 373 approved by the Governor on August 20, 1927, entitled "U. S. GOVERNMENT, JURISDICTION CEDED TO" as the same appears in Georgia Laws, 1927 pages 352-353 and is of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 2nd day of April, in the year of our Lord One Thousand Nine Hundred and Sixty-Two and of the Independence of the United States of America the One Hundred and Eighty-Sixth.

(Seal)

/s/ BEN W. FORTSON, JR.
Secretary of State.

[fol. 418]

Sec. 7. Be it further enacted by the authority aforesaid, that all laws and parts of laws in conflict with this Act be and the same are hereby repealed; and that, public welfare requiring it this Act take effect from and after its passage.

Approved August 20, 1927.

U. S. GOVERNMENT, JURISDICTION CEDED TO.

No. 373.

An Act to provide for the acquisition of land in the State of Georgia by the United States for governental purposes; to cede jurisdiction to the United States under certain limitations; and for other purposes.

Consent for U. S. Government to acquire land.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that the consent of the State of Georgia is hereby given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post-offices arsenals, other public buildings whatever, or for any other purposes of government.

Jurisdiction ceded to U. S.

Sec. 2. Be it further enacted by the authority aforesaid, that the exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the State retains the right to serve thereon all civil and criminal processes issued under authority of the State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

Right retained to serve process.

Jurisdiction vests when.

Sec. 3. Be it further enacted by the authority aforesaid, that the jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation, or otherwise;

and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under authority of the State.

Exemption from tax.

Approved August 23, 1927.

VITAL STATISTICS.

No. 340.

An Act to provide for registration and records of births and deaths in this State, and the collection and preservation of such records, and a bureau of vital statistics under the supervision and charge of the State Board of Health; to provide for the appointment and compensation of a State Registrar and of local registrars of vital statistics, and for clerical and other assistants and their compensation; to provide for payment of local registration fees by county treasurers; to prescribe the duties of such officers; to provide for registration districts; to provide for certificates of births and of deaths; for permits for burial, cremation, removal, and other disposition of dead bodies; for records of sales of coffins or caskets; and for registration of midwives, with local registrars; to prescribe penalties for violations of this law; and for other purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, that the State board of health shall have charge of the registration of births and deaths in this State; shall prepare the necessary instructions, forms, and blanks for obtaining and preserving such records, and shall procure the faithful registration of same in each primary registration district as constituted in section 3 of this Act, and in the central bureau of vital statistics at the

Registration of births and deaths: State Board of Health in charge.

[fol. 420]
[Handwritten notation—Tyndall Field]

DEED

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, the following-described land, within the limits of the County of Bay, State of Florida, has been acquired by condemnation and is now being held by the United States of America for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dockyards and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States:

A tract of land situated in the County of Bay, State of Florida, more particularly described as follows:

Beginning at the Southwest Corner of Section 33, Township 5 South, Range 12 West, Tallahassee Meridian; thence North eighty-seven degrees and forty-four minutes East (N87°44′E) along the South boundary of Section 33, two thousand five hundred eighteen and four tenths (2,518.4) feet to a concrete monument and point of beginning; thence South one degree and fifty-eight minutes East (S01°58′E) along the half-section line of Section 4, two thousand six hundred seventy-four and one tenth (2,674.1) feet to a concrete monument; thence continue South one degree and fifty-eight minutes East (S01°58′E) along the half-section line of Section 4, two thousand six hundred seventy-four and one tenth (2,674.1) feet to a concrete monument; thence South zero degrees and fifty-five minutes East (S00°55′E) along the half-section line of Section 9, two thousand six hundred eighty-three and eight tenths (2,683.8) feet to a concrete monument; thence continue South zero degrees and fifty-five minutes East (S00°55′E) along the half-section line of Section 9, two thousand six hundred, eighty-three and eight tenths (2,683.8) feet to a concrete monument; thence South zero degrees and two minutes West (S00°02′W) along the half-section line of Section 16, four thousand three hundred ninety and two tenths (4,390.2) feet to a concrete monument; thence continue South zero degrees and two minutes West (S00°02′W) along the half-section line of Section 16, three hundred ten (310.0) feet to a point on the mean low water line of the Gulf of Mexico;

thence along the mean low water line of the Gulf of Mexico in a general westerly direction to a point which is North seventy-nine degrees and seven minutes West (N79°07′W) thirteen thousand six hundred eight (13,608.0) feet to a point where the range line between Range 12 West and Range 13 West intersects the mean low water line of the Gulf of Mexico; thence continue along the mean low water line of the Gulf of Mexico in a general northwesterly direction on the South shore of Crooked Island to a point which is North fifty-three degrees and thirty-nine minutes West (N53°39′W) nineteen thousand seven hundred sixty-four (19,764.0) feet; thence continue along the mean low water line of the Gulf of Mexico on the South shore of Crooked Island, to a point which is North thirty-two de-
[fol. 421] grees and thirty-nine minutes West (N32°39′W) eighteen thousand eight hundred eighty-eight (18,888.0) feet (said point being on Crooked Island at entrance to St Andrews Sound); thence along the mean low water line of St. Andrews Sound on the North shore of Crooked Island in a general southeasterly direction to a point which is South forty-five degrees and fifty-six minutes East (S45°56′E) twenty-eight thousand nine hundred forty-seven (28,947.0) feet; thence continue along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction and subsequently in a general easterly direction to a point which is South sixty-four degrees and five minutes East (S64°05′E) seventeen thousand seven hundred fifty-seven (17,757.0) feet (said point is at the head of St Andrews Sound); thence along the mean low water line on the North shore of St. Andrews Sound in a general northwesterly direction to a point at the mouth of Wild Goose Lagoon, subsequently along the mean low water line on the South shore of Wild Goose Lagoon in a general southeasterly and subsequently in a general easterly direction to head of said lagoon, subsequently along the mean low water line on the North shore of Wild Goose Lagoon in a general northwesterly direction, subsequently in a general southeasterly direction to the mouth of Wild Goose Lagoon, subsequently along the mean low water line on the North shore of St. Andrews Sound to a point which is North fifty-three degrees and forty-

nine minutes West (N53°49′W) twenty-six thousand two hundred seventy-two (26,272.0) feet (said point being where section line between Section 34 and Section 35, Township 5 South, Range 13 West, intersects the mean low water line on the North shore of St. Andrews Sound; thence continue along the mean low water line on the North shore of St Andrews Sound in a general northwesterly direction, subsequently in a general southeasterly direction and subsequently in a general northwesterly direction to a point which is North forty-five degrees and eleven minutes West (N45°11′W) fourteen thousand nine hundred thirty-six (14,936.0) feet (said point being where section line between Section 20 and Section 21, Township 5 South, Range 13 West, intersects the mean low water line on the North shore of St. Andrews Sound); thence continue along the meander of the mean low water line of the Gulf of Mexico and St. Andrews Bay in a general northwesterly direction to a point which is North fifty-four degrees and fourteen minutes West (N54°14′W) thirty-one thousand seven hundred eighteen (31,718.0) feet (said point is where township line between Township 4 South and Township 5 South, intersects the mean low water line of St. Andrews Bay); thence continue along the mean low water line on the North shore of St. Andrews Bay in a general northwesterly direction to a point which is North fifty degrees and thirty-five minutes West (N50°35′W) twenty thousand two hundred twelve (20,212.0) feet (point known as Davis Point); thence continue along the mean low water line of St. Andrews Bay in a general northeasterly direction to a point which is North thirty-five degrees and forty-seven minutes East (N35°47′E) ten thousand one hundred sixty-four (10,164.0) feet (point known as Redfish Point) thence continue along the meander of the mean low water line of East St. Andrews Bay (and bayous leading off from East St. Andrews Bay) in a general southeasterly direction to a point which is South fifty-six degrees and fourteen minutes East (S56°14′ E) eleven thousand seven hundred seventy-five (11,775.0) feet; thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay, in a general easterly direc-
[fol. 422] tion to a point which is North eighty-two degrees

and eight minutes East (N82°08′E) five thousand twenty-two (5,022.0) feet; thence continue along the mean low water line on the South shore of East St. Andrews Bay in a general southeasterly direction to a point which is South thirty-seven degrees and twenty-six minutes East (S37°26′E) one thousand five hundred seventeen (1,517.0) feet; thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay in a general southerly direction to the mouth of Pearl Bayou, subsequently along the meander of the mean low water line of Pearl Bayou and subsequently along the mean low water line on the South shore of East St. Andrews Bay in a general easterly direction to a point which is South eighteen degrees and fifty-three minutes East (S18°53′E) eight thousand two hundred ninety-four (8,294.0) feet; thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay (and a bayou leading off from East St. Andrews Bay) in a general easterly direction, subsequently in a general southerly direction and subsequently in a general northerly direction to a point which is South eighty-three degrees and zero minutes East (S83°00′E) seven thousand four hundred fifty (7,450.0) feet; thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay (and bayous leading off from St. Andrews Bay) in a general easterly direction to a point which is South seventy-seven degrees and eleven minutes East (S77°11′E) eight thousand one hundred sixty-one (8,161.0) feet (point known as Cedar Point); thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay in a general southeasterly direction, subsequently in a general southwesterly and subsequently in a general northeasterly direction to a point which is South sixty-one degrees and thirty-nine minutes East (S61°39′E) thirteen thousand six hundred fifty-three (13,653.0) feet (point known as Goose Point); thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay in a general southwesterly direction and subsequently in a general southeasterly direction to a point which is South twenty-five degrees and forty-six minutes East (S25°46′E) ten thousand

one hundred forty-one (10,141.0) feet (point known as Little Oyster Bay Point); thence continue along the meander of the mean low water line on the South shore of East St. Andrews Bay (and bayous leading off from the South shore of East St. Andrews Bay) in a general southeasterly, subsequently southerly, subsequently northerly, and subsequently easterly direction to a point which is South fifty-nine degrees and seventeen minutes East (S59°17'E) twenty-two thousand six hundred forty-nine (22,649.0) feet, said point being where the half-section line through Section 28, Township 5 South, Range 12 West, intersects the mean low water line on the South shore of East St. Andrews Bay; thence South zero degrees and one minute East (S00°01'E) along the half section line through Section 28, Township 5 South, Range 12 West, three hundred ninety-seven (397.0) feet to a concrete monument; thence continue South zero degrees and one minute East (S00°01'E) along the half-section line through said Section 28, two thousand fifty-eight (2,058) feet to a concrete monument; thence South zero degrees and eleven minutes West (S00°11'W) along the half-section line through Section 33, Township 5 South, Range 12 West, two thousand six hundred thirty-one and six tenths (2,631.6) feet to a concrete monument; thence continue South zero degrees and eleven minutes West (S00°11'W) along the half-section line through said Section 33, two thousand six hundred thirty-one and six tenths (2,631.6) feet to a concrete monument and the point of beginning. Being all of fractional Sections 19, 28, 29, 30, 31, 32, and 33 in Township 5 South, Range 12 West, Tallahassee Meridian, and all of Sections 5 and 6, and all fractional Sections 4, 7, 8, 9, 16, 17 and 18 in Township 6 South, Range 12 West, Tallahassee Meridian, and all of fractional Sections 31 and 32 in Township 4 South, Range 13 West, Tallahassee Meridian, and all of Sections 6, 8, 9, 16, 22, 25, 26 and 36, and all of fractional Sections 3, 4, 5, 7, 10, 14, 15, 17, 18, 19, 20, 21, 23, 24, 27, 28, 29, 32, 33, 34 and 35 in Township 5 South, Range 13 West, Tallahassee Meridian, and all of fractional Sections 1, 2, 3, 4, 10, 11, 12, and 13 in Township 6 South, Range 13 West, Tallahassee Meridian, and all of fractional Sections 8, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 33,

[fol. 423]

34, 35 and 36 in Township 4 South, Range 14 West, Tallahassee Meridian, and all of Section 1 in Township 5 South, Range 14 West, Tallahassee Meridian, and all of fractional Sections 2, 3, 11 and 12 in Township 5 South, Range 14 West, Tallahassee Meridian, all on East Peninsula in Bay County, Florida, and containing twenty-eight thousand five hundred seventeen and sixty-five hundredths (28,517.65) acres, more or less, excepting therefrom the following parcels of land comprising 1822.48 acres, more or less, and described as follows:

PARCEL NO. 6

Beginning at the Northeast Corner of Section 17, Township 6 South, Range 12 West, Tallahassee Meridian, thence South zero degrees and one minute West (S00°01'W) along the East boundary of Section 17, two thousand four hundred fifty (2,450.0) feet to a point on South shore of St. Andrews Sound, the point of beginning; thence continue South zero degrees and one minute West (S00°01'W) along the East boundary of Section 17, one thousand four hundred (1,400.0) feet to mean low water line of the Gulf of Mexico; thence along the mean low water line in a general northwesterly direction to a point which is North seventy-five degrees and eleven minutes West (N75°11'W) two thousand seven hundred sixty-eight (2,768.0) feet; thence North one thousand three hundred ninety-five (1,395.0) feet to a point on South shore of St. Andrews Sound; thence along the mean low water line in a general southeasterly direction to a point which is South seventy-five degrees and seventeen minutes East (S75°17'E) two thousand seven hundred sixty-six (2,766.0) feet to the point of beginning. Being in Section 17, Township 6 South, Range 12 West, Tallahassee Meridian, and containing eighty and fifty-five hundredths (80.55) acres, more or less.

PARCEL NO. 6 C

Beginning at the Northeast Corner of Section 17, Township 6 South, Range 12 West, Tallahassee Meridian; thence South zero degrees and one minute West (S00°01'W) along the East boundary of Section 17, one thousand three hun-

dred twenty (1,320.0) feet to the point of beginning; thence continue South zero degrees and one minute West (S00°-01'W) one thousand one hundred (1,100.0) feet to a point on the mean low water line of St. Andrews Sound; thence along the mean low water line on the North shore of St. Andrews Sound in a general westerly direction to a point which is North seventy-six degrees and thirty-two minutes West (N76°32'W) seven hundred ninety-eight (798.0) feet; thence continue along the mean low water line on the North shore of St. Andrews Sound in a general northeasterly direction to a point which is North fifty-five degrees and twenty-six minutes East (N55°-26'E) eight hundred forty-[fol. 424] five (845.0) feet; thence continue along mean low water line on the North shore of St. Andrews Sound in a general northwesterly direction to a point which is North seventy-one degrees and twelve minutes West (N71°12'W) one thousand three hundred seventy-seven (1,377.0) feet; thence South eighty-nine degrees and thirty-eight minutes East (S89°38'E) one thousand three hundred eighty-three and four tenths (1,383.4) feet to the point of beginning. Being in Section 17, Township 6 South, Range 12 West, Tallahassee Meridian, and containing twelve and ninety-six hundredths (12.96) acres, more or less.

PARCEL NO. 15 A

Beginning at the Northwest Corner of Section 18, Township 6 South, Range 12 West, Tallahassee Meridian, the point of beginning; thence in a general southeasterly direction along the mean low water line on the South shore of St. Andrews Sound to a point which is South seventy degrees and fifty-four minutes East (S70°54'E) five thousand six hundred forty (5,640.0) feet; thence South along the East boundary of Section 18 one thousand eight hundred thirty-five (1,835.0) feet to a point on the mean low water line of the Gulf of Mexico; thence in a general westerly direction along the mean low water line of the Gulf of Mexico to a point which is North seventy-three degrees and fifty-eight minutes West (N73°58'W) five thousand five hundred forty-five (5,545.0) feet; thence North along the West boundary of Section 18, two thousand one hundred

fifty (2,150.0) feet to the point of beginning. Being in Section 18, Township 6 South, Range 12 West, Tallahassee Meridian, and containing one hundred sixty-four and five tenths (164.5) acres, more or less.

PARCEL NO. 16

Beginning at the Northeast Corner of Section 13, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence South along the Range line between Range 12 West and Range 13 West two thousand one hundred fifty (2,150.0) feet to a point on the mean low water line of the Gulf of Mexico; thence along the mean low water line of the Gulf of Mexico in a general northwesterly direction to a point which is North sixty-two degrees and fifty-eight minutes West (N 62°58'W) four thousand seven hundred thirty-two (4,732.0) feet; thence East along the North boundary of Section 13, four thousand two hundred fifteen (4,215.0) feet to the point of beginning. Being in Section 13, Township 6 South, Range 13 West, Tallahassee Meridian and containing one hundred twenty-three and sixty-seven hundredths (123.67) acres, more or less.

PARCEL NO. 17

Beginning at the Southeast Corner of Section 12, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence West along the South boundary of Section 12, four thousand two hundred fifteen (4,215.0) feet to a point on the mean low water line of the Gulf of Mexico; thence along the mean low water line of the Gulf of Mexico in a general northwesterly direction to a point which is North fifty-three degrees and five minutes West (N.53°05'W) one thousand three hundred thirty-two (1,332.0) feet; thence North along the West boundary of Section 12 four thousand four hundred eighty (4,480.0) feet to Section corner which is a point on the mean low [fol. 425] water line on the South shore of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general southerly direction and subsequently in a general southeasterly direction

to a point which is South forty-five degrees and zero minutes East (S45°00′E) seven thousand four hundred sixty-seven (7,467.0) feet to the point of beginning. Being in Section 12, Township 6 South, Range 13 West, Tallahassee Meridian, and containing one hundred seventy-one and twenty-eight hundredths (171.28) acres, more or less.

PARCEL NO. 28 A

Beginning at the Southeast Corner of Section 2, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence West along the South boundary of Section 2, two thousand five hundred ninety (2,590.0) feet to a point on the mean low water line on the South shore of St. Andrews Sound; thence along the mean low water line on the South shore of Saint Andrews Sound in a general easterly direction to a point which is North eighty degrees and fourteen minutes East (N80°14′E) one thousand eight hundred sixty (1,860.0) feet; thence continue along mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South sixty-seven degrees and twenty-two minutes East (S67°22′E) eight hundred twenty (820.0) feet to the point of beginning. Being in Section 2, Township 6 South, Range 13 West, Tallahassee Meridian, and containing nine and twenty-seven hundredths (9.27) acres, more or less.

PARCEL NO. 28 B

Beginning at the Southwest Corner of Section 2, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence North along the West boundary of Section 2, three hundred thirty (330.0) feet to a point on the mean low water line on the South shore of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South fifty-six degrees and two minutes East (S56°02′E) five hundred ninety-one (591.0) feet; thence West along the South boundary of Section 2 four hundred ninety (490.0) feet to the point of beginning. Being in Section 2, Township 6 South, Range

13 West, Tallahassee Meridian, and containing one and forty-three hundredths (1.43) acres, more or less.

PARCEL NO. 29

Beginning at the Northeast Corner of Section 11, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence South along the East boundary of Section 11, four thousand four hundred eighty (4,480.0) feet to a point on the mean low water line of the Gulf of Mexico; thence along the mean low water line of the Gulf of Mexico in a general northwesterly direction to a point which is North fifty-three degrees and twenty minutes West (N53°20'W) six thousand five hundred eighty-two (6,582.0) feet; thence North along the West boundary of Section 11, five hundred fifty (550.0) feet; thence East along the North boundary of Section 11, four hundred ninety (490.0) feet to a point on the mean low water line on the South shore of St. Andrews Sound; thence along the mean low water line of St. Andrews Sound in a general easterly direction [fol. 426] to a point which is East two thousand two hundred (2,200.0) feet; thence East along the North boundary of Section 11, two thousand five hundred ninety (2,590.0) feet to the point of beginning. Being in Section 11, Township 6 South, Range 13 West, Tallahassee Meridian, and containing three hundred twenty-two and eighty-two hundredths (322.82) acres, more or less.

PARCEL NO. 30

Beginning at the Northeast Corner of Section 10, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence South along the East boundary of Section 10, five hundred fifty (550.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North forty-seven degrees and one minute West (N47°01'W) eight hundred seven (807.0) feet; thence East along the North boundary of Section 10, five hundred ninety (590.0) feet to the point of beginning. Being in Section 10, Township 6 South, Range 13 West, Tallahassee Meridian, and

containing three and forty-two hundredths (3.42) acres, more or less.

PARCEL NO. 31

Beginning at the Southeast Corner of Section 3, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence West along the South boundary of Section 3, five hundred ninety (590.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North forty-seven degrees and fifty-one minutes West (N47°51′W) six thousand three hundred twenty-six (6,326.0) feet; thence North along the West boundary of Section 3, one thousand twenty-five (1,025.0) feet to a point on the mean low water line on the South shore of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South forty-seven degrees and twelve minutes East (S47°12′E) seven thousand one hundred ninety-seven (7,197.0) feet; thence South along the East boundary of Section 3, three hundred thirty (330.0) feet to the point of beginning. Being in Section 3, Township 6 South, Range 13 West, Tallahassee Meridian, and containing one hundred fourteen and ten hundredths (114.10) acres, more or less.

PARCEL NO. 36

Beginning at the Northwest Corner of Section 10, Township 5 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence East along the North boundary of Section 10, four thousand four hundred (4,400.0) feet to a point on the mean low water line of East Bay; thence along the mean low water line on the South shore of East Bay in a general southwesterly direction to a point which is South thirty-nine degrees and forty-seven minutes West (S39°47′W) five thousand one hundred fifty (5,150.0) feet; thence West one thousand one hundred (1,100.0) feet; thence North zero degrees and four minutes West (N00°-04′W) along the West boundary of Section 10, three thousand nine hundred fifty-seven and one tenth (3,957.1) feet

to the point of beginning. Being in Section 10, Township [fol. 427] 5 South, Range 13 West, Tallahassee Meridian, and containing two hundred ninety-five and eighteen hundredths (295.18) acres, more or less.

PARCEL NO. 42 A

Beginning at the Southwest Corner of Section 28, Township 5 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence North along the West boundary of Section 28, one thousand nine hundred (1,900.0) feet to a point on the mean low water line of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general easterly direction to a point which is South seventy-eight degrees and thirty-six minutes East (S78°36′E) one thousand seven hundred twenty-five (1,725.0) feet; thence continue along the mean low water line on the South shore of St. Andrews Sound in a general southerly direction to a point which is South five degrees and forty-nine minutes East (S05°49′E) one thousand five hundred sixty-seven (1,567.0) feet; thence West along the South boundary of Section 28, one thousand eight hundred fifty (1,850.0) feet to the point of beginning. Being in Section 28, Township 5 South, Range 13 West, Tallahassee Meridian, and containing seventy-eight and eighty-two hundredths (78.82) acres, more or less.

PARCEL NO. 47 A

Beginning at the Southeast Corner of Section 29, Township 5 South, Range 13 West, Tallahassee Meridian; thence West along the South boundary of Section 29, six hundred ninety-five (695.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point on the South boundary of Section 20, which is North thirty-seven degrees and fifty-eight minutes West (N37°58′W) six thousand six hundred ninety-seven (6,697.0) feet to the point of beginning; thence continue along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North thirty-three degrees and thirty-six minutes West (N33°-

36′W) nine hundred ten (910.0) feet; thence North along the West boundary of Section 20, three thousand three hundred (3,300.0) feet to a point on the mean low water line on the South shore of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general northeasterly direction to a point which is North thirty-nine degrees and fifteen minutes East (N39°15′E) four hundred fifty-five (455.0) feet; thence continue along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South sixteen degrees and twenty-six minutes East (S16°26′E) four thousand five hundred ninety-seven (4,597.0) feet; thence West along the South boundary of Section 20, one thousand eighty-five (1,085.0) feet to the point of beginning. Being in Section 20, Township 5 South, Range 13 West, Tallahassee Meridian, and containing eighty-four and forty-four hundredths (84.44) acres, more or less.

PARCEL NO. 48

Beginning at the Northeast Corner of Section 4, Township 6 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence South along the East boundary of Section 4, one thousand twenty-five (1,025.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico [fol. 428] in a general northwesterly direction to a point which is North forty-five degrees and zero minutes West (N45°00′W) one thousand four hundred sixty-four (1,464.0) feet; thence East along the Township line between Township 5 South and Township 6 South, one thousand forty (1,040.0) feet to the point of beginning. Being in Section 4, Township 6 South, Range 13 West, Tallahassee Meridian, and containing thirteen (13.0) acres, more or less.

PARCEL NO. 49

Beginning at the Northwest Corner of Section 33, Township 5 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence East along the North boundary of Section 33, one thousand eight hundred fifty (1,850.0)

feet to a point on the mean low water line of St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general southerly direction to a point which is South seventeen degrees and forty-eight minutes East (S17°48′E) three thousand two hundred thirty-three (3,233.0) feet; thence continue along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South forty-six degrees and fifty minutes East (S46°50′E) three thousand two hundred eighteen (3,218.0) feet; thence West along the South boundary of Section 33, nine hundred forty (940.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North forty-three degrees and fifty-nine minutes West (N43°59′W) six thousand one hundred twelve and five tenths (6,112.5) feet; thence North along the West boundary of Section 33, eight hundred eighty-two (882.0) feet to the point of beginning. Being in Section 33, Township 5 South, Range 13 West, Tallahassee Meridian, and containing one hundred sixty-one and sixty-four hundredths (161.64) acres, more or less.

PARCEL NO. 49 A

Beginning at the Northeast Corner of Section 32, Township 5 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence South along the East boundary of Section 32, eight hundred eighty-two (882.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North thirty-eight degrees and fourteen minutes West (N38°14′W) one thousand one hundred twenty-three (1,123.0) feet; thence East along the North boundary of Section 32, six hundred ninety-five (695.0) feet to the point of beginning. Being in Section 32, Township 5 South, Range 13 West, Tallahassee Meridian, and containing seven and ninety-eight hundredths (7.98) acres, more or less.

PARCEL NO. 51

Beginning at the Southeast Corner of Section 29, Township 5 South, Range 13 West, Tallahassee Meridian, the point of beginning; thence West along the South boundary of Section 29, six hundred ninety-five (695.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North thirty-seven degrees and fifty-eight minutes West (N37°58′W) six thousand six hundred ninety-seven (6,697.0) feet; thence East along the North boundary of Section 29, one thousand eighty-five (1,085.0) feet to a point on the mean low water line on St. Andrews Sound; thence along the mean low water line on the South shore of St. Andrews Sound in a general southeasterly direction to a point which is South thirty-five degrees and twenty-eight minutes East (S35°28′E) four thousand five hundred [fol. 429] seventy-four (4,574.0) feet; thence continue along the mean low water line on the South shore of St. Andrews Sound in a general easterly direction to a point which is North seventy-two degrees and thirteen minutes East (N72°13′E) one thousand one hundred thirty (1,130.0) feet; thence South along the East boundary of Section 29, one thousand nine hundred (1,900.0) feet to the point of beginning. Being in Section 29, Township 5 South, Range 13, West, Tallahassee Meridian, and containing one hundred ten and seventy-seven hundredths (110.77) acres, more or less.

PARCEL NO. 53

Beginning at the Southeast Corner of Section 29, Township 5 South, Range 13 West, Tallahassee Meridian; thence West along the South boundary of Section 29, six hundred ninety-five (695.0) feet to a point on the mean low water line on the Gulf of Mexico; thence along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North thirty-seven degrees and fifty-eight minutes West (N37°58′W) six thousand six hundred ninety seven (6,697.0) feet; thence continue along the mean low water line on the Gulf of Mexico in a general

northwesterly direction across the Southwest Corner of Section 20, to a point which is North thirty-three degrees and thirty-six minutes West (N33°36′W) nine hundred ten (910.0) feet to a point on the East boundary of Section 19, the point of beginning; thence continue along the mean low water line on the Gulf of Mexico in a general northwesterly direction to a point which is North thirty-four degrees and zero minutes West (N34°00′W) two thousand three hundred ten (2,310.0) feet; thence continue along the mean low water line on the Gulf of Mexico in a general northerly direction to a point which is North nine degrees and thirty minutes East (N09°30′E) one thousand five hundred thirty (1,530.0) feet to a point on the west end of Crooked Island; thence continue along the mean low water line on the Gulf of Mexico in a general southerly direction and subsequently in a general northeasterly direction to a point which is South eighty-three degrees and eleven minutes East (S83°11′E) one thousand forty-seven (1047.0) feet; thence South along the East boundary of Section 19, three thousand three hundred (3,300.0) feet to the point of beginning. Being in Section 19, Township 5 South, Range 13 West, Tallahassee Meridian, and containing sixty-two and forty hundredths (62.40) acres, more or less.

PARCEL NO. 74 D

Beginning at the Southwest Corner of Section 17, Township 4 South, Range 14 West, Tallahassee Meridian; thence North zero degrees and fifty-eight minutes West (N00°58′W) along the West boundary of Section 17, three thousand nine hundred sixty (3,960.0) feet; thence South eighty-eight degrees and forty-four minutes East (S88°44′E) seven hundred ten (710.0) feet to the point of beginning; thence North zero degrees and fifty-eight minutes West (N00°58′W) four hundred (400.0) feet; thence South eighty-eight degrees and forty-four minutes East (S88°44′E) four hundred sixty-five (465.0) feet to a point on the mean low water line of East Bay; thence along the mean low water line on the West shore of East Bay in a general southeasterly direction to a point which is South twenty-nine degrees and forty-seven minutes East

[fol. 430] (S29°47'E) four hundred sixty-seven (467.0) feet; thence North eighty-eight degrees and forty-four minutes West (N88°44'W) six hundred ninety (690.0) feet to the point of beginning. Being in Section 17, Township 4 South, Range 14 West, Tallahassee Meridian, and containing four and twenty-five hundredths (4.25) acres, more or less.

AND WHEREAS, application in writing has been made by the United States of America to me, Spessard L. Holland, Governor of the State of Florida, to cede to the said United States of America jurisdiction over said land;

NOW, THEREFORE, I, Spessard L. Holland, Governor of the State of Florida, in the name and by the authority of said State and pursuant to the statutes of said State in such cases made and provided, do hereby cede to the United States of America, exclusive jurisdiction over said land so acquired;

PROVIDED, HOWEVER, that said cession of jurisdiction is made upon the express condition that the said State of Florida retains and shall have concurrent jurisdiction with the United States in and over said land and every portion thereof so far that all process, civil or criminal, issuing under authority of the State of Florida, or any of the courts or judicial officers thereof, may be executed by the proper officer thereof upon any person or persons amenable to the same, within the limits and extent of said land in like manner and like effect as if said statutes of the State of Florida had never been passed and this instrument had never been executed; saving, however, to the United States security to their property within said limits and extent, and exemption of the same from any taxation under laws of the State while the same shall continue to be owned and occupied by the United States for the purposes above expressed and not otherwise, and provided further, that this cession is made and shall in all things be subject to the terms and effect of the statutes of the State of Florida in such cases made and provided the same as if such statutes were herein fully set forth.

[fol. 431] IN TESTIMONY WHEREOF, I, Spessard L. Holland, Governor of the State of Florida, have hereunto set my hand and caused this instrument to be countersigned by the Secretary of State and sealed with the Great Seal of the State of Florida, at the Capitol, at Tallahassee, this 7th day of January, in the year of our Lord, one Thousand Nine Hundred and Forty-three.

/s/ SPESSARD L. HOLLAND
Governor of the State of Florida

ATTEST:

/s/ R. A. GRAY
Secretary of State of the State of Florida

STATE OF FLORIDA)
) ss.
OFFICE OF SECRETARY)
OF STATE

I, R. A. Gray, Secretary of State of the State of Florida, do hereby certify that the foregoing Deed of Cession has been duly recorded in this office in Deed Book "B", Pages 53-54-55-56-57 58 & 59.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capitol, this 11th day of January, A.D., 1943.

/s/ R. A. GRAY
Secretary of State

[fol. 432]

STATE OF FLORIDA

(Emblem)

Office of Secretary of State.

I, Tom Adams, Secretary of State of the State of Florida, do hereby certify that the above and foregoing are true and correct copies of Deed of Cession covering certain lands in the County of Bay, State of Florida, recorded on the

eleventh day of January A. D. 1943 in Deed Book "B", Pages 53 thru 59, as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the 3rd day of April A. D. 1962.

(Seal)

/s/ Tom Adams
Secretary of State

[fol. 433]

Supreme Court of the United States

No. 601, October Term, 1962

Polar Ice Cream & Creamery Company, Appellant,

vs.

Charles O. Andrews, Jr., etc. et al.

Appeal from the United States District Court for the Northern District of Florida.

Order Noting Probable Jurisdiction—March 18, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 19 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 38

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

JURISDICTIONAL STATEMENT.

JOE J. HARRELL, ESQ.,
JONES AND HARRELL,
Florida National Bank Building,
Pensacola, Florida,
J. A. McCLAIN, JR., ESQ.,
Suit 615, Marine Bank Building,
Tampa, Florida,
Attorneys for Appellant.

INDEX.

	Page
JURISDICTIONAL STATEMENT	1
PROOF OF SERVICE	12
APPENDIX:	
Order of Court Below	13
Opinion, Findings of Fact and Conclusions of Law of Court Below	15
Text of Statute Involved	26

CITATIONS.

Cases.

Baldwin v. Seelig, 294 U.S. 511, 79 L.Ed. 1032	9
Braunfeld v. Brown, 366 U.S. 599; 6 L.Ed.2d 563; 81 S.Ct. 1144	2
Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73; 4 L.Ed.2d 568; 80 S.Ct. 568	2
Idlewild Bon Voyage Liquor Corp. v. Epstein, U.S. ....; 8 L.Ed.2d 794; 82 S.Ct.	2
Louisiana v. National Association for the Advancement of Colored People, 366 U.S. 293; 6 L.Ed.2d 301; 81 S.Ct. 1333	2
Morey v. Doud, 354 U.S. 457; 1 L.Ed.2d 1485; 17 S.Ct. 1344	2
Parker v. Brown, 317 U.S. 341; 87 L.Ed. 315; 62 S.Ct. 367	2

CITATIONS—(Continued):

Page

The Constitution of the United States.

Article I, Section 8, Clause 3 (Commercial Clause) . . 3, 5, 11

Article I, Section 8, Clause 17 . . . . . 3, 5
Article VI, Clause 2 (Supremacy Clause) 3, 4, 5, 10
Fourteenth Amendment 4, 6, 11

Statutes.

Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. Sect. 2301, et seq. 3, 10
Title 28, U.S.C. 1253 2
Title 28, U.S.C. 2281 2
Title 28, U.S.C. 2284 4

Florida Statutes:
Chapter 501, Florida Statutes, 1961 . . . . . 2, 4, 5, 7
Section 501.05 9
Section 501.13(8) 9

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

JURISDICTIONAL STATEMENT.

The opinion of the Three-Judge Court, District Court of the Northern District of Florida, dated July 26, 1962, does not appear to have been reported as of this date. A copy of the opinion is contained in the Appendix to this Statement.

Jurisdiction of the Supreme Court of the United States is invoked by reason of the following:

This is a direct appeal to the Supreme Court of the United States from an Order of a Three-Judge Court

denying, after notice and hearing, a permanent injunction in a civil action required by Title 28, Section 2281, U. S. Code, to be heard by a District Court of Three Judges. The Appeal is brought pursuant to Title 28, U.S.C. 1253.

The Judgment or Decree sought to be reviewed was entered on July 26, 1962. The Notice of Appeal was filed on September 21, 1962, in the United States District Court for the Northern District of Florida.

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this Appeal is Title 28, U.S.C., Section 1253.

Cases believed to sustain the jurisdiction are as follows:

Parker v. Brown, 317 U.S. 341; 87 L.Ed. 315; 62 S. Ct. 367;

Morey v. Doud, 354 U.S. 457; 1 L.Ed.2d 1485; 17 S. Ct. 1344;

Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73; 4 L.Ed.2d 568; 80 S. Ct. 568;

Louisiana v. National Association for the Advancement of Colored People, 366 U.S. 293; 6 L.Ed.2d 301; 81 S.Ct. 1333;

Braunfeld v. Brown, 366 U.S. 599; 6 L.Ed.2d 563; 81 S.Ct. 1144;

Idlewild Bon Voyage Liquor Corp. v. Epstein, ... U.S. .....; 8 L.Ed.2d 794; 82 S.Ct. .....

The validity of Chapter 501, Florida Statutes, 1961, is involved. It may be found in Volume 2, Page

2220, The Official Florida Statutes, 1961. The provisions of this statute are set forth in an Appendix to this Statement.

(1) The questions presented by this Appeal are as follows:

(a) Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

(b) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violate Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States.

(c) Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflicts with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat.

22, 10 USC, Section 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

(d) Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Plaintiff of property without due process of law.

(2) That it denies to the Plaintiff equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the Plaintiff.

A Complaint was filed by the Plaintiff, which is now Appellant, in the United States District Court for the Northern District of Florida, which contained a Prayer for a Temporary Restraining Order and a Prayer that a Three-Judge Court should determine the action or proceeding in accordance with Title 28, U.S.C., Section 2284, and there was contained the further prayer that a permanent injunction should issue, and that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, be declared to be null and void, unconstitutional and of no effect, and that the Plaintiff be granted such other and further relief as the Court should deem appropriate.

A Temporary Restraining Order was thereafter issued, and an Amended Complaint was filed, which adopted the Prayer contained in the original Complaint, and also attacked certain orders of the Florida

Milk Commission issued pursuant to the authority granted it by the provisions of Chapter 501, Florida Statutes, 1961. Copies of the specific orders were attached to the Amended Complaint and made a part thereof. The orders were attacked on the grounds that they were unconstitutional in that they were in violation of Article I, Section 8, Clause 3, of the Constitution of the United States; that the orders, insofar as they pertained to milk sold to an agency of the United States of America and delivered on military reservations, exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violates Article VI, Clause 2, of the Constitution of the United States, and that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, were unconstitutional and were violative of the Fourth Amendment to the Constitution of the United States.

The Appellant company is a milk distributor whose plant is located in the State of Florida sixteen miles from the Alabama state line. Under the Florida Milk Commission, a base system was instituted whereby each Florida producer who sold milk to the Appellant was allocated a certain percentage of Class I sales, which are sales of fluid milk for human consumption, and the base percentage was computed to require the Appellant to take all milk produced by its Florida producers and to use it for Class I sales before it could purchase any out-of-state milk and use the same in Class I sales, thus insulating the Florida producers

and requiring the highest price to be paid for Florida milk. The Administrator of The Florida Milk Commission admitted that the base allocation would give Florida milk producers preferential treatment, as compared with producers in Alabama or in other states. Even though Alabama milk of comparable quality could be purchased for 40¢ per gallon, or less, the Appellant would be forced to take the Florida milk and pay 61¢ per gallon for it, if the same were used for human consumption. The Appellant had various government contracts, one of them being with Fort Benning, Georgia, for the furnishing of milk of a value of more than $1,000,000.00, and the contract provided that the same be supplied by Appellant at a cost delivered to Fort Benning, Georgia, of 58¢ per gallon. Likewise, there was a tax imposed by the Statute of .15 of one cent upon each gallon of milk distributed by each distributor during each month. The tax, under the orders of the Florida Milk Commission, would be collected on milk delivered to military installations, exclusive jurisdiction to which had been ceded to the United States of America, and it was contended in the Court below by the Appellant that the tax violated the Supremacy Clause of the Constitution of the United States, and that the orders of the Florida Milk Commission, together with the statutory requirements as applied to the Appellant, were unconstitutional, violated the Commerce Clause of the Constitution of the United States, and also violated the Fourteenth Amendment to the Constitution of the United States.

The Appellant also had military contracts for delivery on military bases located on property exclusive jurisdiction to which had not been ceded to the United States. From the testimony, it was developed that Florida producers received 61¢ per gallon for milk under the orders of the Florida Milk Commission, which was the highest price paid for milk in the United States, and that milk from Alabama of the same quality could be purchased for 34½¢ per gallon. The evidence further showed that there was no emergency insofar as a supply of milk was concerned, and that milk and dairy products were in extreme surplus which continued to grow, and that the Government bought, in the surplus price support program, between April, 1961, and February 8, 1962, 1,300,000,000 pounds of dairy products.

The purity and wholesomeness of milk is regulated outside the jurisdiction of The Florida Milk Commission and is not a subject covered under Chapter 501, Florida Statutes, 1961.

Appellant submits that the questions presented are so substantial as to require plenary consideration, with briefs on the merits, and oral argument for their resolution for the following reasons:

1. Chapter 501, Florida Statutes, 1961, was originally passed during the Depression years, when milk was in scarce supply, and it was necessary, in order to insure an adequate supply of milk for the health and welfare of its people. Now milk is greatly in surplus. Yet, the entire Milk Act was designed to protect,

isolate and insulate the Florida milk producers from competition with milk producers outside the State of Florida and to require milk distributors to pay to Florida producers a price which, at the time of the trial of this case, was the highest price in the United States, even though milk of the same quality and purity could be bought in the State of Alabama, just sixteen miles away, for little more than one-half the Florida price. By the same token, the distributor appellant sold milk in the City of Pensacola which it was forced to purchase at 61¢ per gallon from its Florida producers in direct competition with Alabama milk which could be purchased in Alabama for 40¢ per gallon and distributed in Pensacola, Florida.

2. A base system was established by order of the Florida Milk Commission and appears as Exhibit "L" to the Amended Complaint of Appellant, which awarded all of the Florida producers of Appellant a percentage of the Class I sales of Appellant. The total percentage was 100%, thus requiring that Florida producers would receive preferential treatment, and Appellant was forced to pay the price of 61¢ per gallon for all Florida milk, if it sold more gallons than their aggregate production in Class I sales. The base also is expressed in a percentage ratio, rather than on a gallonage basis. Thus, if the gallonage of Florida producers increased, the Appellant, nevertheless, would have to take an ever-increasing amount of this milk and pay 61¢ per gallon for it, even though Alabama milk, or milk from other states of comparable quality and purity, could be purchased for 40¢ per gallon, or

less. Also, the Appellant distributor does not have the right to terminate the contractual relationship created solely by the Florida Milk Commission, except by showing just cause acceptable to the Florida Milk Commission. (*Section 501.05, Florida Statutes, 1961*).

3. *Section 501.13, Subparagraph 8, Florida Statutes, 1961*, contains virtually the exact language that was struck down in the case of *Baldwin v. Seelig, 294 U.S. 511, 79 L.ed. 1032*, which is as follows:

> "It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful."

4. Under the orders and regulations of the Florida Milk Commission, as administered, the Appellant would be required to pay 61¢ per gallon for any Florida milk delivered to a military installation, either within or without the State of Florida, and whether on a military reservation exclusive jurisdiction to which had been

ceded to the United States of America or not. The Appellant has a number of military contracts, wherein it agreed to deliver packaged, bottled milk to the reservation at a price of 58¢ per gallon, which contracts were executed prior to the time the Pensacola area in which distributor's plant is located came under the jurisdiction of the Florida Milk Commission.

5. A tax of 15¢ per 100 gallon is imposed for each gallon of Florida milk sold and delivered, even to a military installation exclusive jurisdiction to which had been ceded to the United States of America, thus by both the required price of 61¢ per gallon, and the imposition of the tax, violate the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States, and conflict with Federal Procurement statutes and policies (*Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C., Section 2301, et seq.*).

Furthermore, it is clear that there is no emergency which requires the police power of the State of Florida to be invoked, so as to regulate the production, price and distribution of milk, in view of the tremendous surplus in the whole milk industry, and the attempt so to do constitutes an undue burden on commerce between the States, in violation of the Constitution of the United States. The testimony was undisputed that if every one of the Florida milk producers were to go out of the milk business, citizens of the Pensacola area would not "miss the milkman". This is true because of the advance made in transportation facilities, so that milk from northwestern Wisconsin can be delivered in thirty-six hours to

Pensacola, Florida, which would meet all necessary health requirements for distribution within the State of Florida.

From the foregoing, it is apparent that the statute and orders and regulations issued pursuant thereto violate *Article I, Section 8, Clause 3, of the Constitution of the United States*, by not only fixing the price of milk moving in Interstate Commerce, but also, it sets up an economic barrier within the State of Florida and is violative of the Fourteenth Amendment to the Constitution, in that it deprives the Appellant of property without due process of law, denies to Appellant equal protection of the law, and discriminates unreasonably, arbitrarily and oppressively against the Appellant.

JONES AND HARRELL,
Florida National Bank Building,
Pensacola, Florida,

By .....
JOE J. HARRELL,
J. A. McCLAIN, JR.,
Suite 615, Marine Bank Building,
Tampa, Florida,
Attorneys for Appellant.

PROOF OF SERVICE.

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17 day of November, 1962, I served a copy of the foregoing Jurisdictional Statement, together with Appendix, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record, as follows: MALLORY E. HORNE, of Horne & Rhodes, 102½ South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert G. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.

JOE J. HARRELL, of
JONES AND HARRELL,
Attorneys for Polar Ice Cream and Creamery Company,
Florida National Bank Building,
Pensacola, Florida.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION.

TALLAHASSEE CIVIL ACTION No. 851.

POLAR ICE CREAM & CREAMERY COMPANY,
Plaintiff,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Defendants.

ORDER.

In accordance with opinion and findings of fact and conclusions of law heretofore filed this day, and the Court having determined that plaintiff is not entitled to relief sought in this litigation, it is, therefore, upon consideration, hereby

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff is entitled to no relief and that all previous orders restraining the defendant, Florida Milk Commission, in this cause be and the same are dissolved.

2. The costs of this action may be taxed upon the plaintiff in accordance with the law and the rules of the United States District Court for the Northern District of Florida.

DONE AND ORDERED this 26th day of July, 1962.

(S.) WARREN L. JONES,
United States Circuit Judge,

(S.) DOZIER A. DeVANE,
United States District Judge,

(S.) G. HARROLD CARSWELL,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION.

TALLAHASSEE CIVIL ACTION No. 851.

POLAR ICE CREAM & CREAMERY COMPANY,
Plaintiff,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Defendants.

OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Before JONES, Circuit Judge, and DeVANE and CARSWELL, District Judges.

CARSWELL, District Judge:

Jurisdiction in this cause is predicated upon an averment of a constitutional question and jurisdictional amount. Plaintiff is a Florida corporation located in Pensacola, Florida, and engaged in the distribution of milk and milk products. Defendant is the Florida Milk Commission, an agency of the State of Florida.

The Pensacola Milk Marketing Area came under the control of the defendant on November 21, 1961, after

a favorable vote by the producers and producer-distributors of that area as prescribed by Section 501.20, Florida Statutes. Thereafter, the defendant passed a number of orders having to do with the classification of milk, minimum prices for the sale of milk, base percentages for producers, and other administrative details for fixing and maintaining a fixed price for milk.

Testimony was taken and arguments heard with reference to the following issues:

1. Whether Chapter 501, Florida Statutes, and the regulations and orders of defendant, as applied to milk delivered by plaintiff to military reservations, are unconstitutional.

2. Whether the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, impose an undue burden upon interstate commerce, and are therefore unconstitutional.

3. Whether the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, violate his constitutional rights of freedom of contract, due process, and equal protection of the law.

These issues are taken in order.

1. Plaintiff makes several allegations concerning the application of Chapter 501, Florida Statutes, and

defendants' regulations and orders to "military milk" (milk delivered to United States military installations). Plaintiff first attempted to show that the regulatory fee imposed on milk distributed by plaintiff to military installations is a tax imposed by the State of Florida, and, therefore, violates the supremacy clause (Article I, Section 8, Clause 17) of the United States Constitution. However, the finding of this Court is that the fifteen-one hundredths (15/100ths) of one cent per gallon imposed by the defendant is not a revenue raising device. It is in the nature of a regulatory fee based upon the privilege of doing business in the State of Florida, and not a tax upon milk.[1] Due to the above finding and the absence of any showing on this record that the amount of the fee imposes an undue burden upon interstate commerce, we conclude that the imposition of the fee upon the plaintiff is proper, even though plaintiff delivers milk to United States military installations.[2]

Plaintiff's second objection concerning "military milk" centers around the Federal Procurement Statutes.[3] Plaintiff attempted to show that the provisions of the regulations and orders of the defendant and the provisions of Chapter 501, Florida Statutes, violate the Federal Procurement Statutes, and are, therefore, invalid under Article VI, Section 2, of the United States Constitution. In support of this contention plaintiff

[1] Chapter 501.09, Florida Statutes. 1956 Op. Atty. General of Florida 056-43, Feb. 16, 1956.
[2] Texas Co. v. Brown, 258 U.S. 466. Baldwin v. Seelig, 294 U.S. 511.
[3] Armed Forces Procurement Act of 1947. 62 Stats. 22, 10 U.S.C. §2301, et seq.

relies upon the case of *United States v. Paul*, 190 F. Supp. 645. This case is now pending in the United States Supreme Court. We cannot anticipate the total effect of the decision forthcoming from the Supreme Court; however, it appears to us that the *Paul* case does not present a comparable situation. In *Paul* the Court concluded that:

> "(T)he California Milk Stabilization Act places a prohibition on the Federal Government within the meaning of the Public Utilities Case (Public Utilities Commission v. United States, (1958) 355 U.S. 534), and therefore so conflicts with the Federal Procurement Statutes and policy as to be invalid under the supremacy clause, Article VI, Section 2."

The distinguishing factor between the *Paul* case and the case at bar is that in *Paul* there was a direct imposition by the state statute upon the Federal Government acting in its capacity of a consumer, by setting a minimum price for the sale of milk and imposing penalties on the seller *and* the consumer for its failure to maintain this minimum price. There is no showing here of any restriction placed upon the price paid by the Federal Government for milk purchased for military installations. Indeed, there is no proof of any restriction upon plaintiff from selling milk to military installations at any price agreeable to plaintiff and its customer, regardless of whether the military installation is located in the State of Florida or any other state. Further, there is no proof of any

limitation imposed on the price that a customer must pay the plaintiff, be the customer military or civilian. For the above reasons the Court is of the opinion that the regulations, orders, and provisions of Chapter 501, Florida Statutes, as applied to plaintiff under the facts in this case, do not violate the Federal Procurement Statutes.

2. Plaintiff contends that the provisions of Chapter 501, Florida Statutes, as applied to him, place an undue burden upon interstate commerce. Plaintiff sought to prove that the "base plan" as set up by the statutes, and the orders and regulations of defendant discriminate against out-of-state producers, and therefore, restricts interstate commerce. Plaintiff further contends that the base plan, or base formula, as set up by the defendants' regulations requiring plaintiff to purchase all the milk supplied by his producers operates as a restraint of trade in interstate commerce. This is so, it is urged, because after purchasing locally produced milk at sixty-one cents (61¢) per gallon plaintiff has reduced his financial ability to purchase out-of-state milk at a lower price with the practical result of the regulation preventing him from buying and selling out-of-state milk on a free market.

While it may be true that the purpose of the Florida Statute is to assist and protect Florida milk producers, this does not necessarily make the statutes unconstitutional. It must be shown that alleged discrimination against out-of-state producers is a burden upon inter-

state commerce or actually restricts interstate commerce.[4]

Plaintiff relies most heavily upon the case *Baldwin v. Seelig*, 294 U.S. 511, for the proposition that Florida Statute Section 501.13(8) is unconstitutional as a restraint on interstate commerce. In that case the plaintiff, Seelig, Inc., a New York milk distributor, purchased milk in Vermont at a lower price than required by New York statute. Ninety percent of the milk was sold to customers in the original cans, and ten percent was removed from the cans, bottled and sold to customers in New York City. The New York statute (which is identical to F.S. 501.13(8)) provided that there should be no sale within New York of milk purchased outside New York unless the price paid to the out-of-state producer was one that would be lawful in a like transaction within the State of New York. The Court restrained enforcement of the Act insofar as sales made by Seelig while the milk was in the original cans or packages, but refused to grant an injunction as to milk removed from the original cans and thereafter sold in bottles. The United States Supreme Court upheld the action of the Trial Court in restraining the enforcement of the Act as to the milk in original packages and further held that it should have granted the final decree as to the rebottled milk also, since New York had no power to regulate the prices of milk in Vermont, and held that New York could not prevent the introduction of Vermont milk of wholesome quality into New York. The Court stated that New York's

[4] Milk Control Board v. Eisenberg Co., 306 U.S. 346.

refusal to allow the sale of milk purchased at a lower price in Vermont amounted to a barrier to traffic between one state and another as effective as a custom duty.

The facts here adduced simply do not reflect a comparable state of affairs concerning this plaintiff and the Florida Milk Commission. There is no such application of the statute in this case.

It is a settled principle that the Court has authority to determine whether a statute enacted by a state legislature is or is not constitutional. However, in order to justify a pronouncement that a legislative act is unconstitutional the case must be so clear as to be free from doubt.[5] While courts will pass on the validity of statutes when such a determination is necessarily involved, unnecessary decisions will be avoided,[6] and courts will not assume to pass on constitutional questions unless properly before them.[7] The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question,[8] and this is what the plaintiff would have us do. In *Baldwin* the court found that the State of New York was attempting to regulate the price of milk in the State of Vermont. No such situation exists in the present case. Neither the regulations and orders of the defendant nor the proof presented by the plaintiff upon trial in this action show that the plaintiff is restricted from

[5] Powell v. Pennsylvania, 127 U.S. 678.
[6] Crowell v. Benson, 285 U.S. 22.
[7] Champlin Ref. Co. v. Corporation Comm., 286 U.S. 210.
[8] Anniston Mfg. Co. v. Davis, 301 U.S. 337.

selling milk to consumers at any price agreeable to him and his customer. The defendant does not attempt to regulate the price that the plaintiff pays his out-of-state producers, nor do the regulations restrict plaintiff from purchasing out-of-state milk in any amount or for any price. This contention is without merit.

3. Plaintiff complains, finally, that Chapter 501, Florida Statutes, and the regulations and orders of the defendant deprive it of its liberty of contract and property without due process of law, and deny him equal protection of the law. The rationale of plaintiff on the undisputed facts is to the effect that:

a. Plaintiff is required to take all milk tendered by its Florida producers at fixed prices and is given no assurance of any rate of return. Therefore, the regulatory scheme of the defendant is one-sided and results in violation of due process, and denies equal protection of the law.

b. The statutory and commission imposed restrictions and requirements deprive the plaintiff of its liberty of contract in that it is ordered to take all milk of its Florida producers, and is forced into contractual relationship created solely by the defendant, and plaintiff is not free to terminate this relationship except by showing just cause acceptable to the defendant commission.

The liberty of contract is the freedom from arbitrary restraint not immunity from reasonable regulations

imposed in the interest of the community.[9] It is a well settled rule that the state may lawfully impose such restrictions in the exercise of its police power.[10]

The principle of due process of law has been said to secure the citizen against any arbitrary deprivation of his rights,[11] and is a limitation upon arbitrary power and a guaranty against arbitrary legislation.[12] However, the states are not deprived of the power to regulate for the public welfare, but merely required to insure that the end be accomplished by methods consistent with due process.[13]

Equal protection of the laws like due process is perhaps not capable of precision in its multifold applications, however, the guiding principle is often stated as requiring that all persons be treated alike under like circumstances and conditions.[14] Control over the business of producing or dealing in milk products is acknowledged to be within the police power of the state, and price regulations in that industry have been upheld in a number of decisions as not violating the constitutional right of equal protection of the law.[15]

From the above it is apparent that the real issue to be determined is whether or not the regulations and orders of the defendant and the provisions of Chapter

[9] West Coast Hotel Co. v. Parrish, 300 U.S. 379.
[10] Id.
[11] Jones v. Brim, 165 U.S. 180.
[12] Nebbia v. New York, 291 U.S. 502.
[13] Id.
[14] Hartford v. Steam Boiler Inspection & Insurance Co., 301 U.S. 459.
[15] Nebbia v. New York, 291 U.S. 502.

501, Florida Statutes, as applied to plaintiff are a valid exercise of the State's police power. The Florida Supreme Court has on at least two occasions expounded on this question and upheld the statute.[16] We agree with that Court's statement in *Shiver v. Lee*, at page 321:

> "We have never found a stronger finding of fact and statement of policy as the basis for regulating and administering a great industry than that embodied in the two paragraphs preceding this for control of the milk industry. Chapter 19231, Acts of 1939, from which Chapter 501, Acts of 1953, was in the main drawn, was a complete departure from the previous milk control acts, in that it recognized the necessity for continuous control and supervision of the milk industry. One cannot read the findings of fact and statement of policy without being convinced that the paramount purpose of the legislature was to invoke the police power for protection of the public health, safety and welfare as well as the welfare of those engaged in the milk industry. Every legislature since said Act was passed has amended and strengthened it and the 1955 legislature refused to repeal or modify it."

and at page 323:

> "A casual reading of the legislative findings shows that the milk industry had through devious means become a sick business, that an adequate supply of fresh, wholesome milk for

[16] Shiver v. Lee, 89 So. 2d 318. Borden Co. v. Odham, 121 So. 2d 625.

> the public had become imperiled and that it was necessary for the protection of the public, the consumer and producer to impose rigid restrictions and price fixing. It would be difficult to point out a more convincing case for legislative intervention. . . ."

We find from the evidence adduced at the trial that the plaintiff has failed to sustain the burden of proof that there has been an illegal application of this power of the Milk Commission upon this plaintiff. It is elementary, but perhaps worth repeating, that such power may be unlawfully applied in another instance, but in all instances the proof must be made.

It is the duty of the court to sustain police measures unless it is clearly, plainly and palpably in violation of the Constitution.[17] An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance.[18] At best plaintiff's contentions are an earnest conflict of serious opinion, and the proof offered to sustain these contentions is quite insufficient to warrant the relief sought, and judgment is accordingly entered by appropriate order for the defendant.

The foregoing is adopted by this Court as findings of fact and conclusions of law.

Dated this 26th of July 1962.

---

[17] Euclid v. Ambler Realty Co., 272 U.S. 365.
[18] Erie RR Co. v. Williams, 233 U.S. 685.

[2220] CHAPTER 501

MILK COMMISSION

501.01 Legislative finding; statement of policy.
501.02 Definitions of terms used in chapter.
501.03 Milk commission.
501.04 Powers of milk commission.
501.05 Rules and orders of milk commission.
501.051 Official actions of commission, place for transaction.
501.06 Investigations by commission.
501.07 Entry on and inspection of premises where milk is sold, etc.
501.08 Injunction to restrain violation.
501.09 Issuance, revocation, etc., of licenses to milk dealers.
501.10 Records of licensees.
501.11 Reports by licensees.
501.13 Order by commission fixing price of milk.
501.14 Collective sales by cooperative corporations.
501.15 Interstate and federal compacts.
501.16 Audits and reports to governor and legislature.
501.17 Divulging of information by commission members, etc., forbidden; penalty.
501.18 Law declared not applicable to interstate commerce.
501.19 Owner of three cows or less exempt.
501.20 Exercise and withdrawal of exercise of supervisory and regulatory powers in markets.
501.21 Duration of commission.
501.23 Penalty for violations.

501.01 Legislative finding; statement of policy.—This chapter is enacted in the exercise of the police power of the state, and its purpose generally is to protect the

public health, safety and welfare." It is declared that the production and distribution of milk, cream and other milk products in the state is an industry upon which to a large degree, the prosperity and health of the people of the state depend, and that the present economic emergency is in part a result of the disparity between the prices of milk, cream and milk products and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, and has broken down the orderly production and marketing of milk, cream and other milk products, and has seriously impaired the agricultural assets supporting the credit structure of the state and political subdivisions thereof; that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have grown up and have been carried on in the production, sale and distribution of milk, cream and milk products in this state which impair dairy industry in this state and imperil the constant supply of pure and wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of this state; that such conditions existed at the time of the creation of the milk control board and constituted a menace to the health welfare and reasonable comfort of the inhabitants of this state, and will again constitute such menace should all regulations as set forth in said law creating said board go out of existence. In order, therefore, to protect the well-being of our citizens, and to promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk, cream and milk products in the state is declared to be a business affecting the public health and interest of its citizens; and the production, transportation, manufacture, storage, distribution and sale of milk, cream and milk products to be a paramount industry upon which the prosperity of the

state and the welfare of its citizens in a large measure depends. In order to correct abuses arising from the destructive and unfair manipulation of prices which are found to spring from a selfish disregard of the public interest in the manner of carrying on the dairy industry, which is an organized industry, it is found necessary to resort to the legislative remedy of regulating prices to save both producers and consumers from such manipulation of prices in the industry; because such practices amount to evils which menace the health, safety, and welfare of the people at large, this chapter is passed. It is further found that the acute economic emergency which existed at the time of the creation of the milk control board was partly the consequence of a severe and increasing disparity between the prices of milk and other commodities, as aforesaid stated; that such practices were and are curtailed by the existence of said board, but will immediately recur should said board and the regulations set up to be administered thereby pass out of existence; that the purchasing power of milk producers is in imminent danger of again being broken down and demoralized; that the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of interruption in public supervision and control in accord with proper standards of production, sanitation and marketing; that it is therefore necessary that said business be supervised and regulated by proper legislation. The foregoing statement of fact, policy and application of this chapter are declared as a matter of legislative finding and determination.

501.02 Definitions of terms used in chapter.—As used in this chapter, unless otherwise expressly stated, or unless the context or subject-matter otherwise requires:

"Administrator" means the administrator for the milk commission.

"Commission" means the state agency created by this chapter, to be known as the milk commission.

"Person" means any person, firm, corporation or association, and includes the members of partnerships, the officers of corporations and the members of associations.

[2221] "Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state in any market as defined in this chapter. Each corporation which if a natural person would be a milk dealer within the meaning of this chapter, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

"Dairy farmer" means a person producing milk within the state.

"Producer" means a person producing milk within the state and where the term dairy farmer or producer is used in this chapter or in any other laws referring to the powers and duties of the Florida milk commission the two terms shall be construed to mean one and the same; provided, however, that persons appointed to the milk commission as "dairy farmers" cannot also be distributors of milk.

"Distributor" means any milk dealer who operates a milk gathering station or processing plant where milk is collected and bottled or otherwise processed and prepared for sale.

"Producer-distributor" means a distributor as herein defined who is also a producer as herein defined, pro-

ducing at least seventy-five per cent of the milk he processes and prepares for sale.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Bob tail" means any person distributing milk at retail or wholesale who does not process or bottle the milk products he distributes or sells, and for the purpose of this chapter is classified and termed a distributor as defined herein and is subject to all the terms and provisions of this chapter applicable to a distributor, including the payment of all license fees or charges by this chapter imposed.

"Store" means a grocery store, hotel, restaurant, hospital, orphanage, soda fountain, dairy products store or other establishment where milk, cream or milk products are kept or offered for sale.

"Milk" means liquid milk and cream, fresh, sour, or storage, and condensed or concentrated whole milk, except when contained in hermetically-sealed cans, originally obtained from the complete milking of one or more healthy cows. In each instance where quantity is referred to, the intent is to include its whole milk equivalent.

"Market" means any city, town or village of the state, or two or more cities, towns or villages and surrounding territory designated by the commission as a natural marketing area containing not less than one thousand population in such designated area.

"Licensee" means any and all persons who are required to obtain a license or permit as required by this chapter.

501.03 Milk commission.—There shall be a milk commission which shall be composed of:

(1) Three citizens not connected with the milk industry other than as consumers of milk who are citizens of the United States and residents of the state for a period of not less than ten years immediately preceding the date of their appointment.

(2) The state health officer, or some employee of the state board of health, and the commissioner of agriculture or some employee of the department of agriculture.

(3) A dairy farmer as defined in this chapter.

(4) One distributor or producer-distributor of milk as defined in this chapter.

The members of the commission shall receive per diem as provided by general law, fractions of day to be computed accordingly, and their legal traveling expenses when actually engaged on the business of the commission; and the members of the commission shall receive the sum of ten dollars per day for attendance at board meetings of the commission. The expenditures of the commission shall not exceed the revenue collected under this chapter. The members of the commission and the administrator hereinafter provided for shall be appointed by the governor of the state and shall serve for a term of four years or until their successors are appointed and qualified.

Provided, that in order to insure rotation in office, the first members named hereunder shall be appoin' for the following terms of office:

One member engaged in the business of producer as described herein shall be appointed for a term of four years.

One member engaged in the distribution of milk as described herein shall be appointed for a term of three years.

Three members, citizens not connected with the milk industry other than as a consumer of milk products, shall be appointed for a term of three years.

That in addition to the members of the commission there shall be an administrator of the commission (without voting powers) who shall be appointed by the governor of the state to serve for a term of four years or until his successor is appointed and qualified. The administrator shall receive compensation in such amount as is approved by the commission unless a different amount is provided in the general appropriations act, together with per diem and his legal traveling expenses when engaged on the business of the commission provided by §112.061.

Provided, however, that the present members of the commission shall hold office until their respective terms have expired.

The members of the commission and the administrator may be removed by the governor for cause as other appointive officers are removed in the state.

Technical, legal and other services for such commission shall be performed, so far as practicable, by forces or officers in the state board [2222] of health and the state department of agriculture without additional compensa-

tion, but the administrator with approval of the commission, shall appoint and at pleasure remove such additional technical, legal and other assistants and employees as may be necessary to carry out the provisions of this chapter, including an auditor not connected with the industry, prescribe their powers and duties and fix their compensation, who shall be paid from the funds collected under any of the provisions of this chapter. The milk administrator shall be the administrative head of the commission. Each member of the commission and the administrator of the commission shall execute and file with the comptroller a bond conditioned for the safe keeping and lawful application of moneys coming to the commission and under his control in such amount as may be approved by the comptroller. The milk administrator shall, subject to the limitation of this chapter, and of law, enforce the provisions of this chapter, but no official act shall be taken, rule or regulation promulgated or official order made or enforced, with respect to the provisions of this chapter, without the approval of a majority of the members of the commission. The principal office of the commission shall be in the city of Tallahassee, but offices in other localities may be maintained by the commission.

501.04 Powers of milk commission.—The milk commission is declared to be an instrumentality of the state for the purpose of attaining the ends recited in the legislative findings, and may:

(1) Supervise and regulate the entire milk industry of the state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk, cream and milk products, in any market established by the commission in the state; provided, however, that nothing contained in this chapter shall be construed to

abrogate or affect the status, force or operation of any provision of any law relating to public health or sanitation, the purity of food or food products, (the public health law, the public service law, the state sanitary code), milk products law, except as provided for in §501.09(4), state ice cream law, or any local health ordinance or regulation; and provided, further, that nothing in this chapter shall give the commission power to make rules or regulations prohibiting the giving away gratis of milk or milk products in cases of charity.

(2) Investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state.

(3) Act as mediator or arbitrator in any controversial issue that may arise among or between milk producers, distributors and producer-distributors as between themselves or that may arise between them as groups. This provision is not mandatory and does not limit the rights of the parties to litigate any disputes or controversies among them arising.

(4) Institute and maintain such suits and actions as may be necessary to the enforcement of the rules and orders of the commission or any provisions of this chapter.

(5) Examine into the business, books, records, and accounts of any producer, distributor, producer-distributor, or milk dealer; issue subpoenas directed to said persons and require them to produce their records, books and accounts, and subpoena any other persons from whom information is desired.

(6) Take depositions of witnesses within or without the state.

(7) Any member of the commission, the administrator, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpoenas. The provisions of the civil law of the state in relation to enforcing obedience to a subpoena lawfully issued by a judge or other person duly authorized under the laws of the state to issue subpoenas in civil cases shall apply to a subpoena issued by the commission as authorized in this section and may be enforced in the manner herein provided.

(8) Prohibit the using, buying, purchasing, selling, offering for sale, disposal of, or trafficking in any milk or cream bottle, can or container, by any person, junk dealer or second hand dealer other than the owner or his duly authorized agent; a violation of this provision is expressly declared to be unlawful and to constitute a misdemeanor.

(a) When any milk or cream bottle, can or container shall have stamped thereon the name, trademark or design of some particular person the same shall be deemed prima facie evidence of ownership in the person whose name, trademark or design shall appear thereon.

(b) Possession by any person, junk dealer or second hand dealer other than the owner or his duly authorized agent, of any milk or cream bottle, can or container bearing the name, trade-mark or design of such owner shall be deemed prima facie evidence of violating the provisions of this chapter, unless such person, junk dealer or second hand dealer shall have

been the purchaser of the contents of the said milk or cream bottle, can or container, or shall have exchanged one of his own milk or cream bottles in due course of distribution of milk to his trade.

(c) Upon application to the commission by any person whose name, trade-mark or design is affixed to any milk or cream bottle, can or container, who is the owner thereof, stating under oath that the same is in possession of some other person than the owner, after its contents have been consumed, and that such person refuses to deliver possession thereof to the owner after demand except upon claim or ownership, the commission shall issue a rule to show cause directed to such person requiring such person, within five days after service upon him, to show cause why delivery and possession should not be given to the rightful owner. [2223] The commission upon hearing the testimony offered by the parties shall determine the right of possession thereof in a summary manner and enter an order according to the justice of the cause. Any person who violates the turn-over order entered by the commission after a full hearing, shall be subject to punishment for contempt, and the commission shall forthwith report such action to the county judge of the county in which such hearing is held, and the county judge upon an affidavit filed reasonably establishing any such or other offense shall punish such person guilty thereunder, after rule to show cause, in the same manner as a[illegible]her contempt may be punished by said judge in any [illegible]ceeding over which the county judge may lawfully preside. Upon being adjudged in contempt by the county judge, such person shall be punished by fine not to exceed fifty dollars, or imprisonment not to exceed sixty days. All rights for relief under the laws of the state in con-

tempt proceedings shall be applicable to persons affected by this provision.

(9) Make, adopt and enforce all rules, regulations and orders necessary to carry out the purpose of this chapter; hold hearings after reasonable notice thereof has been given; receive sworn testimony and evidence at hearings as to the reasonableness of any order, rule or regulation of the commission; reasonably classify and establish definite market areas, and provide different rules, regulations and charges therefor; establish health and sanitary requirements. The commission after public hearing and investigation may fix the prices to be paid producers by distributors, milk dealers or producer-distributors in any market or markets; may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk; may establish the grades of milk; may establish reasonable rules and regulations for fair competition, and fix reasonable rules and regulations for the conduct of the commission's business and for the regulation of its employees; may require reasonable examinations of license applicants to test their general fitness to engage in any business defined in this chapter; may establish rules and regulations for hearings in keeping with the procedure herein authorized; may revoke, suspend or refuse to issue the license of any person hereunder for the violation of any rule, regulation or order of the commission, after due notice and a fair hearing as herein provided; may provide for the collection of license fees authorized by this chapter, and may regulate all matters reasonably incidental to the general or specific powers herein recited; may provide for deputy administrators in any market area created by the commission, with such authority as may

be designated by the commission, including the power to investigate complaints, report violations of the commission's orders, and to have such other powers reasonable or incidental thereto, including the right to administer oaths, make investigations, conduct hearings when ordered by the commission, and on due notice to take testimony in connection with investigations of complaints, and to cause the same to be stenographically transcribed and reported and transmitted to the commission for final action thereon, together with such other authority as the commission may designate in keeping with the general powers and purposes created under this chapter.

(10) The commission may designate and use a legal seal and formulate and determine the wording and form thereof; such seal may be affixed by the chairman or secretary of the commission, or its administrator, to all original legal orders of the commission and to any and all legally certified copies of orders or records of said commission.

(11) The operation and effect of any provision of this chapter conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this chapter of a specific power or powers.

(12) The Florida milk commission is hereby expressly prohibited from fixing the price of milk sold and delivered to lunch rooms of the public schools of Florida for consumption by students therein, and to all charitable organizations of a public or semi-public nature who buy milk for free distribution to the needy.

501.05 Rules and orders of milk commission.—

(1) The commission shall adopt and enforce all rules and orders necessary to carry out the provisions of this chapter, and may formulate procedures and regulations whereby the commission may through the services of the administrator and its various area deputies render all possible assistance to milk distributors and dairy farmers in ascertaining current milk supply needs in all areas of the state and in securing the cooperation of distributors and dairy farmers in the transfer of milk not needed for class 1 purposes from one distributor to another and from one area to another, in order that the consumer may be assured of a more adequate supply of fresh wholesome milk at all times and the dairy farmer may receive the best market classification possible for the milk which he produces. It shall be the duty of the deputy administrators and all licensees to cooperate with the commission in carrying out the provisions of this subsection.

(2) Every rule or order of the commission shall be posted for public inspection in the main office of the commission and a certified copy filed in the office of the secretary of state. Copies of all orders and records of the commission authenticated by the signature of the administrator shall for all purposes be deemed to be certified copies. An order applying only to [2224] person or persons named therein shall be served on the person or persons affected. An order required to be served shall be served by personal delivery of a certified copy or by mailing a certified copy in a sealed envelope with postage prepaid to each person affected thereby, or, in the case of a corporation, to any officer or agent of the corporation

upon whom a summons may be served in accordance with the provisions of the laws of the state. The posting in the main office of the commission of any rule, and of any order not herein required to be served, and such filing in the office of the secretary of state, shall constitute due and sufficient notice to all persons affected by such rule or order. A rule of the commission when duly posted and filed as provided in this section shall have the force and effect of law. The provisions of this section as to service of orders shall not apply to orders fixing prices of milk as to which provision is made in §501.13.

(3) The relationship between a producer and a distributor, under which milk produced by the producer is regularly delivered to and accepted by the distributor, when once established, shall not be terminated either by the producer or by the distributor without just cause therefor, and the approval of the commission. Just cause will be considered by the commission as any cause deemed just by a prudent and reasonable man.

Arbitrary, capricious and vindictive reasons will not be considered as just cause for any such termination.

(4) The commission shall set a standard date as the date from which not less than ninety days written notice in writing and in advance must be given by the producer or the distributor involved to the other before any such theretofore established relationship may be terminated; unless such notice is given, such relationship will not be terminated, even though just cause exists for termination, unless just cause exists excusing the failure to give such notice.

501.051 Official actions of commission, place for transaction.—The commission is hereby expressly authorized and empowered to hold meetings at any place in the state, and at any such meeting to make, adopt and promulgate all lawful rules, regulations, resolutions and orders, and take all lawful action. Any such rule, regulation, resolution or order made, adopted or promulgated, or any such action taken, pursuant to or based upon, in whole or in part, a public hearing, shall be valid and enforceable whether or not such public hearing was also held at the place where such rule, regulation or order was made, adopted or promulgated, or such action is taken. All rules, regulations, resolutions and orders made, adopted or promulgated, and all action taken by the commission, at meetings held at places other than Tallahassee shall have the same full force and effect as such rules, regulations, resolutions and orders made, adopted and promulgated, and action taken at meetings held in the city of Tallahassee.

501.06 Investigations by commissions.—The practice and procedure of the commission with respect to any investigation by the commission authorized by this chapter shall be in accordance with rules and regulations to be promulgated by the commission which shall provide for a reasonable notice to all persons affected by orders to be made by the commission after such investigation, opportunity to be heard either in person or by counsel, and to introduce testimony in their behalf at a public hearing to be held for that purpose. For the purpose of such investigation or any hearing which the commission is authorized or required to conduct, the commission, any member thereof, administrator, or deputy administrator, may conduct such hearing, administer oaths, take depositions, issue subpoenas, compel the attendance of wit-

nesses and the production of books, accounts, papers, records, documents and testimony. In case of disobedience of any person to comply with the order of the commission or a subpoena issued by any person herein authorized to issue same, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, the county judge of the county in which the person resides, on application of any member of the commission, the administrator, or deputy administrator shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. Each public officer who serves such subpoena shall receive the same fee as a sheriff and each witness who appears in obedience to a subpoena before the commission, any member thereof, the administrator, or deputy administrator, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in circuit courts of this state, which shall be audited and paid as other expenses are audited and paid, upon the presentation of proper vouchers, approved by the commission. No witness subpoenaed at the instance of a party other than those herein authorized to issue subpoenas shall be entitled to compensation from the commission unless the commission shall certify that his testimony was material to the matter investigated.

501.07 Entry on and inspection of premises where milk is sold, etc.—Any member of the commission, the administrator, deputy administrator, or an employee designated for the purpose, shall have access to and may enter at all reasonable hours all places where milk is being sold, offered for sale, stored, bottled or manufactured into food products, in any market, established by the commission, and may inspect all books, papers, records or documents in any place within the state for the purpose

[2225] of ascertaining facts to enable the commission to administer this chapter.

501.08 Injunction to restrain violation.—The commission may institute such actions at law or in equity as may appear necessary to enforce compliance with any provision of this chapter, or to enforce compliance with any rule or order of the commission made pursuant to the provisions of this chapter, and in addition to any other remedy herein provided may apply to any circuit court for relief by injunction to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Said court may issue a temporary injunction, without notice, and no bond shall be required to be posted by the commission in any such action, it being an instrumentality of the state.

501.09 Issuance, revocation, etc., of licenses to milk dealers.—(1) No milk dealer shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section, and it is unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or, in any way to deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter.

(2) An application for a license to operate as a milk dealer shall be made on or before July first of each year, by mail or otherwise, to the commission upon blanks prepared under the authority of the commission. The application shall state the nature of the business to be conducted, the full name of the person applying for the license, and if the applicant be a firm, or association,

the full name of each member, and if a corporation the names and addresses of all officers and directors, and the city, town or village and the street number, if any at which the business is to be conducted; facts showing that the applicant has adequate technical personnel, adequate technical and physical facilities to properly conduct the business of receiving and handling milk; that he has complied with all rules and orders of the commission filed or served as required by this chapter, and such other facts with respect to the license or permit as may be required by the commission pursuant to this chapter. Such application shall be accompanied by the license fee required to be paid by this chapter. A license or permit shall be granted to the applicant by the commission, subject to the provisions of this chapter.

(3) The commission may decline to grant any license or permit required hereby or may suspend or revoke a license or permit already granted upon due notice and opportunity of hearing to the applicant, licensee or permittee, when satisfied of the existence of any of the following: The commission shall not in any event grant a license to any distributor who shall not before the issuance of such license produce to the commission a certificate from state, county or municipal health authorities, certifying that such distributor has complied with all health and sanitary laws, ordinances and regulations in effect in this state and in the city and county where any such distributor does business. When such health certificate is revoked, the commission shall immediately suspend the license of such distributor whose certificate was revoked until such time as such distributor shall obtain another certificate showing full compliance with such laws, ordinances and regulations; provided, however, that in localities where such certificates cannot be obtained because there is no law, ordinance or regula-

tion authorizing the issuance of such a certificate, a certificate by an inspector under the milk products law that such distributor has complied with the standards of the United States public health service standard milk ordinance, shall be accepted in lieu thereof.

(a) That a milk dealer has rejected, without reasonable cause, any milk delivered to and accepted by the milk dealer from a producer delivered by or on behalf of the producer in ordinary continuance of a previous course of dealing, or that a milk dealer has rejected without reasonable cause, or has rejected without reasonable advance notice, any milk tendered or offered for delivery to the milk dealer by or on behalf of a producer in ordinary continuance of a previous course of dealing. It is intended hereby to provide and require that a milk dealer shall not reject or refuse to accept any milk tendered or offered for delivery by or on behalf of a producer in ordinary continuance of a previous course of dealing unless there exists reasonable cause for the rejection or refusal to accept such milk and unless the milk dealer has also given such advance notice as may be reasonable under the circumstances of intention to reject or refuse to accept such milk.

(b) That the milk dealer has failed without reasonable cause to account and make payment for any milk purchased from a producer.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof, for the inhabitants of the state affected by this chapter, which is declared to be injurious to the public health, public welfare and to trade

and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section, proof of one act being sufficient to constitute a violation of this section.

(d) Where the milk dealer has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, [2226] upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commission of his inability or unwillingness properly to conduct the business of receiving or selling milk.

(f) Where the milk dealer has continued in a course of dealing of such nature as to satisfy the commission of an intent to deceive or defraud producers or consumers.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commission.

(h) Where it is shown that any statement upon which the license or permit was issued is or was false or misleading in any particular.

(i) Where the applicant is a partnership or corporation and any individual holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this chapter.

(j) Where the licensee has violated any of the provisions of this chapter.

(k) The failure of any person to pay any license fee or other moneys required by the terms of this chapter when due shall constitute due cause for revocation of such person's license or permit.

In case of conduct by a licensee or permittee which would authorize the commission to suspend or revoke a license or permit, the licensee or permittee may propose to the commission the imposition of a fine in lieu of revocation or suspension, and the commission in its discretion may accept such offer and impose a fine. If such fine be promptly paid, revocation or suspension shall not be imposed, but if such fine be not promptly paid, the commission shall proceed to such revocation or suspension. Such fine, however, shall not be imposed unless the commission in its discretion determines that such fine would be adequate punishment and will probably procure future compliance with this law and the rules of the commission by such licensee or permittee; nor shall such fine be imposed unless the permittee or licensee shall in writing state to the commission his desire that a fine be imposed in lieu of revocation or suspension.

(4) No person shall engage in the business of distributing milk within any marketing area established by the commission, nor shall any person act as a distributor of milk within any such area, unless such person shall have obtained from the commission a license to act as a distributor of milk within such area.

On or before the first day of July in each year, all persons desiring to obtain licenses to act as distributors of milk in any marketing area shall file with the com-

mission at its office an application in writing for license, which application shall be upon a form to be prescribed by the commission and shall contain such information as the commission shall require including among other things, the name of the applicant, the address of his place of business, the period of time during which he has been distributing milk within the area, the approximate number of gallons of milk distributed by applicant during each of the twelve months preceding July first of the year in which application is filed, and the names and addresses of the producers from whom the applicant has purchased milk during the period of twelve months preceding July first of the year in which the application is filed. Each application shall be verified by the oath of the applicant or his agent, or, if the applicant be a corporation, by the oath of an officer of such corporation.

Upon the filing of the application and the payment by the applicant to the commission of the sum of five dollars which is fixed as a fee to cover the cost of receiving such application and issuing the license applied for, the commission shall issue or cause to be issued to the applicant a license in such form as the commission shall prescribe, which shall entitle the licensee to conduct the business of a distributor of milk until the first day of July next succeeding the date of the license, and which license shall be conditioned upon compliance by the licensee with all of the provisions of this chapter and all rules and regulations lawfully made pursuant to the provisions of this chapter.

If a person who was not engaged in the business of distributing milk in one of the marketing areas established by the commission on or before July first of any year shall desire to procure a license to engage in such busi-

ness, he shall file an application in the form aforesaid in like manner as other applicants are required to file the same and the commission may issue to such applicant a license for the unexpired portion of the year expiring on July first next succeeding the date of such license, but every such applicant shall pay to the commission the sum of five dollars to cover the cost of receiving such application and issuing such license.

Unless previously revoked in the manner provided by this chapter all licenses issued to distributors shall remain in force and effect until midnight of the first day of July next succeeding the date of the issuance thereof.

On or before the tenth day of each month each distributor shall make a report under oath to the commission upon such form and containing such information as the commission shall prescribe, but each report shall specifically, and in addition to all other information which may be required by the commission, contain and set forth:

(a) The number of gallons of milk produced; the number of gallons of milk received; and the number of gallons of milk distributed by such distributor during the preceding calendar month; and

(b) The name and address of each producer or any other person from whom the distributor purchased milk for distribution during the preceding calendar month and the quantity of [2227] milk purchased from each producer or other person, and the price per gallon paid to each producer or other person for milk so purchased, and the number of gallons purchased by such distributor if such distributor be also a producer.

For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter.

Every person required to make a report and pay any tax upon the distribution of milk under this chapter shall keep and preserve suitable records of sales and distribution of milk and such other books of account as may be necessary to enable the commission at any time to determine the amount of tax due hereunder, and all books and records shall be open to examination at any time by the commission or any of its authorized agents or by the administrator.

The commission may prescribe rules and regulations for the collection of the license fees as provided and specified herein, and provide any and all necessary machinery for the prompt collection of any and all license fees assessed, and may take all such steps as are reasonably necessary and as authorized hereunder to prevent any person engaging in any business herein regulated without first taking out or paying the license fee prescribed, including the right to seek an injunction without notice or bond.

Any and all registration, license fees and other moneys required to be paid hereunder shall be paid to the commission and promptly receipted for by the administrator, and he shall be placed under such reasonable bond in

connection therewith, at the expense of said commission, as the governor of the state may require in order to furnish reasonable security in keeping with the total amount of such proceeds coming into his possession. All proceeds shall be promptly deposited in the state treasury into a separate trust fund to the credit of the commission. Such moneys are hereby appropriated for the administration of the provisions of this chapter unless the legislature provides otherwise in the biennial general appropriations act. All such appropriations shall be disbursed by the comptroller upon vouchers signed by the administrator and countersigned by the chairman of the commission.

Any person subject to the provisions of this chapter failing or refusing to furnish any return required to be made or failing or refusing to furnish a supplemental return or other data required by the commission or who shall violate any of the provisions of this chapter, including failure to secure a license or who shall violate any valid rule or regulation of the commission, or who shall secure a license upon false or fraudulent application, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding six months and each offense and each day of violation shall constitute a separate offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes or signs any false or fraudulent statement with intent to evade the tax hereby levied, shall be guilty of a misdemeanor and shall upon conviction be fined not less than $300.00 and not more than $1,000.00 or be imprisoned in the county jail for not exceeding one year.

If any licensee shall fail to pay the tax required to be paid within thirty days after the same shall become due, then there shall be added to said tax as a penalty for such failure an amount equal to two per cent of the amount thereof for each month or portion of a month during which such tax shall be delinquent, but this may be waived for cause by the commission.

All route salesmen, solicitors and each milk truck driver shall pay an annual license fee of one dollar.

Every distributor, producer-distributor and bob-tail distributor operating or using a truck, car or any vehicle, motor or otherwise, in the sale or delivery of milk products in connection with any regular retail route or wholesale route shall pay an annual license fee of five dollars for each truck, car or vehicle used for such purpose. This is in addition to other license fees or charges set forth, and application and payment therefor shall be made at the same time as other licenses; provided, however, that every bob-tail distributor or producer-distributor is allowed to operate one vehicle without payment of this license fee, but on all other vehicles so operated this license fee must be paid.

Each store shall before making sales or being permitted to purchase at wholesale from distributors, producer-distributors or bob-tails, obtain a permit from the commission, which permit shall be subject to revocation as herein provided for violation hereof as licenses may be revoked hereunder.

Every producer and producer-distributor within the state must secure from the commission an annual permit to engage in business. No charge shall be required therefor, but no producer or producer-distributor shall

engage in business within the state unless such permit be secured and continued in full force and effect. Same may be suspended or revoked for violation of any of the terms of this chapter or lawful rules or orders of the commission after due notice and hearing. Any person feeling aggrieved thereby may appeal to the circuit court as is provided herein for review of such order by the commission.

[2228] No payment of fees provided for in the milk products law, chapter 502 shall be required while this chapter is in full force and effect, but the said fees are expressly suspended for such period of time.

(5) The commission may classify licenses and may issue licenses to milk dealers to store, manufacture or sell milk limited to a particular city or village or to a particular market or markets in the state.

Any applicant, permittee, or licensee deeming himself aggrieved by any action of the commission taken under any of the provisions of this chapter may within thirty days after receipt of a copy of the order of the commission file a petition in error in the circuit court, which shall have jurisdiction to reverse, vacate, or modify the order complained of, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable. The milk commission shall be the defendant in error and such petition in error shall set forth the errors complained of. Thereupon, unless summons shall be waived, summons shall be issued and be served upon the administrator, or in the event of his absence upon any member of the commission, or by leaving a copy at the office of the commission at the city of Tallahassee, with some employee thereof. Upon service or waiver of the summons, the commission shall forth-

with transmit to the clerk of the circuit court a transcript of the record of the commission and the original papers or transcript thereof, and a certified transcript of all evidence adduced upon the hearing before the commission in the proceedings complained of, which shall be filed in the court. No proceedings to reverse, vacate or modify a final order rendered by the commission shall operate to stay the execution or effect thereof unless the circuit court or a judge thereof on application and three days' notice to the commission, shall allow such stay, in which event the plaintiff in error shall be required to execute an undertaking payable to the milk commission in such a sum as the court may prescribe, with surety to be approved by the clerk of the circuit court, conditioned for the prompt payment by the plaintiff in error of all damages, expenses, costs and attorney's fees arising from or caused by the delay in the effectiveness or enforcement of the order complained of.

No court other than the circuit court may review, suspend or delay any order made by the commission with respect to the granting of a license or permit, refusal to grant a license or permit, the granting of a conditional and limited license, or the suspension or revocation of a license or permit, or enjoin, restrain, or interfere with the commission or any member thereof, in the performance of official duties with respect thereto. Nor shall the writ of mandamus be issued against the commissior or any member thereof by any court other than the circuit court.

All rights of appeal from a decree in the circuit court, in chancery, shall exist and be preserved as in other cases.

(6) For the privilege of continuing in or engaging in the business of producing milk, or acting as a dairy farmer under the provisions of this law, there is hereby imposed upon every dairy farmer a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of class 1 milk produced, as defined by the commission, by each such dairy farmer, and delivered to the platform of the distributor or producer-distributor during each calendar month. The amount of such tax shall be deducted by the distributor and the producer-distributor from the moneys due to the dairy farmer, and by such distributor or producer-distributor remitted to the commission at the time that the monthly reports are required to be filed by the distributors or producer-distributors with the commission, as provided by this chapter, and in the event the dairy farmer acts as his own distributor he shall remit the said tax to the commission at the time that the monthly reports are required to be filed by the distributor and producer-distributor with the commission, as provided by this chapter.

(7) The commission may, in issuing a permit to a store after the effective date of this act, provide on it the period of time for which it is effective. Unless the commission, in issuing any such permit, expressly provides upon it the period of time for which it is effective, such permit when issued shall be effective until the store to which it is issued ceases to operate, provided, however, such permit may always be suspended or revoked, as provided herein. All permits now issued to stores shall be effective until the store to which it is issued ceases to operate, provided, however, any such permit may always be suspended or revoked, as provided herein.

(8) A store holding or obtaining a license issued by the hotel and restaurant commission under chapter 509 shall be deemed, for all purposes of this chapter, to hold the permit required of stores under this chapter, and shall not be required to obtain a permit also from this commission, provided, however, the commission may decline to grant, or suspend or revoke, such license as a permit under this chapter for the same reasons or causes and as fully and to the same extent as it may other permits to stores provided for by this chapter.

No store required to hold a license under chapter 509, shall make any sales of milk, or any purchases thereof at wholesale, during any period of time in which it does not hold such license from, or during which such license has been suspended or revoked by, the hotel and restaurant commission.

If at any time during a fiscal year the revenues received by the commission under this chapter exceed by at least twenty-five per cent the total amount of expenditures as budgeted by the commission for that fiscal year, the payment of taxes provided for in this subsection, [2229] and in §501.09(4), on milk distributed by distributors, will be discontinued and such taxes are not imposed for the calendar months remaining in that fiscal year commencing with the first calendar month following the time when such revenues so collected exceed by at least twenty-five per cent the total amount of expenditures so budgeted for that fiscal year. All such taxes are imposed and shall be paid for each calendar month of each fiscal year through and including the month preceding the month in which any such discontinuance provided for herein becomes effective, and those liable for their payment shall continue to be liable therefor, regard-

less whether such taxes, and any penalties for late payments, are paid before or after the time of any such discontinuance.

501.10 Records of licensees.—The commission may require licensees and permittees to keep the following records:

(1) A record of all milk received, detailed as to location and as to names and addresses of suppliers, with butter fat tests, prices paid, deductions or charges made.

(2) A record of all milk sold classified as to grade, location and market outlet and size and style of container, with prices and amounts received therefor.

(3) A record of quantities and prices of milk sold.

(4) A record of the quantity of each milk product manufactured and quantity of milk or cream used in the manufacture of each product, also the quantity and value of milk products sold.

(5) A record of wastage or loss of milk or butter fat.

(6) A record of the items of the spread or handling expenses and profit or loss represented by the difference between the price paid and the price received for all milk.

(7) Such other records and information as the commission may deem necessary for the proper enforcement of this chapter.

501.11 Reports by licensees.—Each licensee and permittee shall, from time to time as required by rule or

order of the commission, make and file a verified report on forms prescribed by the commission of all matters on account of which a record is required to be kept, together with such other information or facts as may be pertinent and material within the scope of the purpose and intent of this chapter. Such report shall cover a period of time specified in the order.

501.13 Order by commission fixing price of milk.—

(1) The commission shall ascertain by such investigation and proofs as the emergency permits and requires what prices for milk in the several localities and markets of the state and under varying conditions will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most to the public interest.

In determining prices to be paid producers, the commission shall take into consideration all conditions affecting the milk industry, including the amount necessary to yield a reasonable return to the producer. In determining what is a reasonable return to the producer the commission shall take into consideration the necessary cost incurred in that particular locality in maintaining dairy animals in a healthy condition, paying wages and supplying working conditions to employees sufficient for their subsistence at levels generally obtaining, and for the safeguarding of their health in defraying the ordinary fixed charges and operating expense incidental to the ownership, control and management of a herd of average numerical size, including a reasonable amount representing annual rent of land and equipment necessarily utilized therein and in addition to afford such producers a reasonable return in excess of their cost of production.

and the volume of milk that might reasonably be expected to be produced by that average herd, and the average standard of its butterfat or milk fat content.

In fixing prices to be paid producers under this chapter, the commission may make them subject to adjustment up or down on account of butterfat or milk fat content in excess of or less than the standard determined by the commission to be average.

Each order of the commission fixing any price to be paid producers for whole fresh liquid milk may be static until further order or may provide that any of the respective prices thereby fixed shall fluctuate as provided therein based upon any reasonably related and ascertainable standard, such as an economical index based upon any set of reliable economical or agricultural statistics reasonably determined by the commission to be appropriately related to milk marketing.

In fixing minimum prices to be paid producers under this chapter for their milk utilized as whole fresh liquid milk the commission shall take into consideration the reasonable return, determined as aforesaid, and the average production volume, determined as aforesaid, and may take into consideration any additional volume of milk that may reasonably be required to be produced in order to provide the volume of milk utilized in such manner.

In fixing the prices to be paid producers for that portion of their milk utilized as whole fresh liquid milk the commission shall take into consideration the factors enumerated hereinabove. In fixing the minimum prices to be paid producers for the remainder of the milk produced by them the commission shall establish [2230] prices therefor not to exceed the market value in Florida of the

component parts thereof. Each order of the commission fixing prices for milk may be static as to any or all of such prices so fixed until further order or may provide that any of the respective prices fixed thereby shall fluctuate as provided therein based upon any reasonably related and ascertainable standard, such as the Chicago butter or other recognized commodity market, with due allowance made for cost of transportation from such market to the market in Florida.

In determining wholesale and retail prices to be paid to or charged by milk dealers, the commission shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the milk dealer. In determining the reasonable return to the milk dealer, the commission shall take into consideration reasonable average operating expense in processing, storage, transportation and delivery charges and all necessary reasonable expenses connected therewith.

Whole fresh liquid milk, as used herein, includes all fluid milk or milk products sold in fluid form, including, but not limited to, skim milk or fortified skim milk.

(2) The commission after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

(a) By milk dealers to consumers.

(b) By milk dealers to stores either for consumption on the premises or resale to consumers.

(c) By stores to consumers for consumption on the premises where sold.

(d) By stores to consumers for consumption off the premises where sold.

(e) When, pursuant to statute, regulations adopted thereunder or ordinances, various grades of milk are specified, the commission shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable. In construing this section it shall be done taking into consideration for fixing the price, the healthfulness and grade of milk produced and whether or not the sale price gives a fair return to the producer.

(3) It is the intent of the legislature that the public emergency requires that the producers and milk dealers receive a fair return for their products. To that end, if the commission after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from the producers or from or through a cooperative corporation of producers organized under the laws of the state in making such purchases has failed to give fair and reasonable effect to such intent, the commission shall upon due notice and after hearing suspend or revoke the license or permit of the milk dealer so offending and, in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of §501.08.

(4) The commission after making such investigation either on its own initiative or on complaint of a repre-

sentative group of producers supplying a particular dealer or a particular market may fix by official order the prices to be paid by milk dealers to producers and others for milk and its various grades and uses. The order of the commission with respect to the prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold, and may vary in different localities or markets according to varying uses and different conditions. Each order may classify milk by forms, classes, grades or uses as the commission may deem advisable and may specify the price therefor. A violation of this subdivision shall render such persons offending this chapter specifically subject to the provisions of §501.08.

(5) After the commission has fixed prices to be charged or paid for milk whether by class, grade or use, it is unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price or prices as shall be applicable to the particular transaction, whether by any discount, or rebate or free service, or advertising allowance or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

(6) Any offender against the matters and things set forth in the foregoing paragraph shall be guilty of a misdemeanor and punished as provided by §501.23. It is

unlawful for any person to knowingly aid, encourage or abet any violation of this chapter or any order of this commission whatsover, or by the use of any advertising method of any character or description whatever on pain of being punished as for a misdemeanor and being subject to being temporarily enjoined by a court of equity without notice and without the furnishing or giving of any bond by the commission.

(7) The commission may upon its own motion or upon application from time to time, alter, revise or amend an official order thereto- [2231] fore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the commission shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the commission shall afford sufficient notice and publicity. Such order of the commission may be reviewed by appeal as provided in this chapter at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(8) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be li-

censed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful.

501.14 Collective sales by cooperative corporations.—It is the intent of the legislature that no provision of this chapter shall prevent, and no provision contained in this chapter shall be deemed or construed to prevent a cooperative corporation, organized and operated under or subject to the provisions of chapter 618, and engaged in making collective sales or marketing of milk for the producers thereof, from blending the net proceeds of all its sales in various classes and whether in fluid form or as manufactured products, both within and without the state, and paying its producers such blended price without such deductions or differentials as may be authorized under contract between such corporation and its producers, or from making collective sales of the milk of its members or other producers represented by it, at a blended price based upon sales thereof in various classes, and whether in fluid form or manufactured products, both within and without the state, and which price is to be paid either directly to producers or to the cooperative corporation. Nothing contained in this chapter shall prevent any milk dealer from contracting for his milk with such cooperative corporation upon such basis. Also no provision of this chapter shall be deemed or construed to affect the contracts of such a cooperative corporation with its producers nor to affect or abridge the rights and powers of such a corporation conferred by the provisions of such chapter or any of its operations thereunder, except as in this chapter otherwise provided.

501.15 Interstate and federal compacts.—The commission may confer with legally constituted authorities of

other states of the United States, with respect to a uniform milk control within the state or as between states, and may enter into a compact or compacts for uniform milk control subject to such federal approval as may be required by law.

501.16 Audits and reports to governor and legislature.—The commission shall have its books and records audited annually by the state auditor or a private auditor and make a full report of its proceedings, including said audit, to the governor and the chairman of the finance committee of the senate and the finance committee of the house, annually.

501.17 Divulging of information by commission members, etc., forbidden; penalty.—No member of said commission, nor any officer, agent or employee thereof, shall divulge to any person the contents of any document, paper or record examined by him in the performance of his duties hereunder, or any information obtained by him in the course of his investigations, except as may be required to carry out the purposes of this chapter. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding five hundred dollars or imprisonment not exceeding one year.

501.18 Law declared not applicable to interstate commerce.—No provision of this chapter shall apply or be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

501.19 Owner of three cows or less exempt.—Any producer of milk that owns, controls or milks three cows

or less shall not be subject to pay the license fee, but shall come under the milk price provision.

501.20 Exercise and withdrawal of exercise of supervisory and regulatory powers in markets.—

(1) The commission shall not supervise and regulate any market in the state which it does not now supervise and regulate, or from which the exercise of its supervisory and regulatory powers is hereafter withdrawn unless there is presented to it a written petition signed by not [2232] less than ten per cent in number of the producers and producer-distributors in such market, and representing not less than fifty per cent of the distributors buying milk from the base earned producers in such market, requesting it to exercise its supervisory and regulatory powers therein and unless, in a secret ballot election, to be called by the commission as promptly as reasonably possible after the presentation to it of such petition, a majority in number of the producers and producer-distributors eligible to vote in such election vote in favor of the exercise by the commission of its supervisory and regulatory powers in such market. If in the election such majority in number vote in favor thereof, the commission shall supervise and regulate such market, but otherwise shall not do so.

(2) Whenever there is presented to the commission a written petition signed by not less than ten per cent in number of the producers and producer-distributors in any market in the state over which the commission is exercising its supervisory and regulatory powers, pursuant to this chapter requesting the commission to withdraw the exercise of such powers from such market, there shall be called by the commission, as promptly as reasonably possible after the presentation to it of such

petition, a secret ballot election among the producers and the producer-distributors in that market. In the event, in such election, a majority in number of the producers and producer-distributors eligible to vote in such election vote in favor of the withdrawal therefrom by the commission of the exercise of its supervisory and regulatory powers, the commission shall withdraw the exercise of such powers by it from such market, but otherwise shall not do so.

(3) The commission shall prescribe the procedure to be followed in calling, holding, conducting and ascertaining the results of the elections provided for herein and may adopt reasonable rules, regulations and orders in regard thereto, but it shall insure that any election held hereunder is held by secret ballot, and that all those entitled to vote therein are given reasonable notice of the time and place of such election and reasonable opportunity to vote therein, provided, however, that the commission shall appoint a person or firm not a producer, producer-distributor or distributor or the commission or any member or employee thereof to conduct any such election called under the provisions of this section. Expenses of calling, holding, conducting and ascertaining the results of any such election shall be paid by the commission. The person or firm so appointed shall certify the results of the election to the commission promptly after such election is held.

The commission may schedule one election at one time and one place but in no event shall an election be held less than six months following an election; if, because of the size of the market involved, or for other reasons, the commission deems it advisable so to do for the convenience of those entitled to vote in such election, it may hold such election at more than one place within

such market, and may designate different times and places within such market at which voting may be done. However, none of the votes shall be canvassed, nor shall any information concerning them be given or disseminated to anyone by the person or firm appointed to conduct the election, until all times fixed for holding such election have elapsed. In the event that any election is conducted at more than one location only one ballot box shall be used by the person or firm appointed by the commission.

(4) Determinations respecting numbers of producers and producer-distributors in any market shall all be made by the commission as of the end of the second calendar month preceding the month in which an election hereunder is called. All persons who were producers or producer-distributors in such market at the end of such second preceding calendar month shall be entitled to sign any such petition, and to vote in any election called hereunder, and shall be counted, regardless whether at the time of signing any such petition, or of its presentation, or of any election held hereunder, they are producers or producer-distributors in the market. Any who were not at the end of such second preceding calendar month producers or producer-distributors in the market shall not be counted in number, in determining the results of any election held hereunder, and shall be eligible neither to sign any such petition nor to vote in any such election, even though they may become producers or producer-distributors in such market after the end of such second preceding calendar month.

The number of producers and producer-distributors voting in the election shall be determined by the commission. In making such determination, the commission may obtain information from all available sources, including, but not limited to, its own records and reports,

the books and records of producers in the market, and the books and records of producer-distributors and distributors in the market, whether such books and records are kept, or are available, within or without the geographical limits of the market. It shall make all such determinations as promptly as reasonably possible and with as much accuracy as is reasonably possible in order to make such determinations without undue delay, and its decisions in regard thereto shall be final.

(5) Whenever, under this section, the commission shall commence exercising, or withdraw the exercise of, its supervisory and regulatory powers in any market, it shall do so by order, and the time when such commencement or such withdrawal shall be effective shall be the date when the results of any election conducted under the provisions of this section are filed with the commission by the person or firm authorized to conduct such election.

[2233] **501.21 Duration of commission.**—A continuing emergency for the regulation of the business and industry herein named shall be presumed and deemed continuing and existing, calling for the need for the existence of this chapter, and the same shall be effective until such date as it is repealed or amended by some subsequent act of the legislature whenever any such continued emergency may be deemed essential to the continued validity of any of the provisions hereof.

501.23 Penalty for violations.—A violation of any provision of this chapter or of any rule or order of the commission lawfully made, except as otherwise expressly provided by this chapter, shall be a misdemeanor punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, and each day during which such violation shall continue shall be deemed a separate violation.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 15 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 38

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

MOTION TO AFFIRM

RICHARD W. ERVIN
Attorney General, State of Florida
Tallahassee, Florida

JOSEPH C. JACOBS
Assistant Attorney General
Tallahassee, Florida

INDEX

	Page
MOTION TO AFFIRM	3
STATEMENT	3
ARGUMENT	5
PROOF OF SERVICE	9

CITATIONS

Cases

Anniston Mfg. Co. v. Davis 301, U.S. 337	7
Baldwin v. Seelig, 294 U.S. 511, 79 L.Ed. 1032	5, 7
Borden Company v. Odham, 121 So. 2nd 625	5
Champlin Ref. Co. v. Corporation Comm., 286 U.S. 210	7
Crowell v. Benson, 285 U.S. 22	7
Highland Farms Dairy, Inc. v. Agnew, et al, 300 U.S. 608	6
Milk Control Board of the Commonwealth, Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346	5
Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469	5
Shivet v. Lee, 89 So. 2nd 318	5
Texas Co. v. Brown, 258 U.S. 466, 67 L.Ed. 721	7
U.S. v. Lee, 13 So. 2nd 919	8
U.S.-Pure Oil Co. v. State of Minnesota, 63 L.Ed. 180	8

CITATIONS—(Continued):

Page

The Constitution of the United States

Article I, Section 8, Clause 17 7

Article VI, Clause 2 (Supremacy Clause) 7

Statutes

Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. Sect. 2301, et seq. 7

Title 28, U.S.C. 2284 4

Title 28, U.S.C. 2325 4

Florida Statutes:

Chapter 501, Florida Statutes, 1961 ..... 4, 5, 7

Section 501.13(8) 5

Section 501.20 4

Section 501.09(8) 7

Section 501.09(4) 8

Texts

1956 Op. Atty. General of Florida, 056-43, Feb. 16, 1956 8

Corpus Juris Secundum, Vol. 15, page 58 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 601

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the Ditsrict Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on July 26, 1962, by a district court of three judges

specially constituted pursuant to 28 U.S.C. §§2284 and 2325, denying the relief sought by Appellant's complaint which sought to set aside a number of orders, rules and regulations promulgated by the Appellee, Florida Milk Commission.

The Pensacola Milk Marketing Area, which is one of five areas under the jurisdiction of Appellee, came under the control of the Appellee on November 21, 1961, after a favorable vote by the producers and producer-distributors of that area as prescribed by Section 501.20, Florida Statutes.

Immediately after acquisition of control of this area by the Appellee, the Appellant retro-actively slashed prices to its producers from $.61 per gallon to $.56 per gallon to $.43 per gallon. Thereafter, the Appellee passed a number of orders having to do with the classification of milk, minimum prices for the sale of milk, base percentage for producers, and other administrative details for fixing and maintaining a fixed price for milk. These rules and orders are the same that exist in the other milk marketing areas.

While violating all these rules and regulations, the Appellant alleged hardship and oppression resulting from control by the Appellee and brought this action even though the Record shows that Appellant candidly admitted that it was regularly purchasing milk from the same identical "base earned producers" for $.61 per gallon during the years that the Appellee exercised no control in that area.

Appellants brought this action in the United States District Court for the Northern District of Florida, seeking to have all the rules and regulations of the Appellee set aside as unconstitutional and seeking to have Chapter 501, Florida Statutes, declared unconstitutional. The District Court denied Appellant any relief and upheld Appellee's rules and regulations and Chapter 501, Florida Statutes, as being constitutional and valid.

ARGUMENT

The decision of the District Court is plainly correct. Chapter 501, Florida Statutes, has been upheld many times as constitutional and not in violation of the Commerce Clause, Due Process and Equal Protection of the Law under the United States Constitution.

As the supreme court of Florida stated in the leading case of Borden Company v. Odham, 121 So. 2nd 625:

> "These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 Lawyers' Edition 940 and Shiver v. Lee, supra.*"

Needles to say, this Court has upheld legislation like Chapter 501, Florida Statutes, many times beginning with the landmark in this field of Nebbia v. New York, 291 U.S. 50, 78 L. Ed. 940.

As the District Court said, the Appellant relies most heavily upon the case of Baldwin v. Seelig, 294 U.S. 511, for the proposition that Section 501.13(8), Florida Statutes, is unconstitutional as a restraint on interstate commerce. The Court clearly distinguished the Baldwin case with the case at Bar as this Honorable Court distinguished the Baldwin case with the case of Milk Control Board of the Commonwealth Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346. In upholding the constitutionality of Pennsylvania's "milk laws", this Court made some observations in Eisenberg that are particularly appropriate to this cause:

> "The respondent maintains a receiving station in Penn-

sylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.

"If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable."

Thus, the Baldwin case is of no significance here because, as the District Court demonstrated, the facts in this case are not at all the same as the facts in that case because Appellee has not attempted in any way to regulate the price of milk in another state. The District Court, therefore, properly refused to consider or render an opinion on a hypothetical set of facts as Appellant would have it do and is now attempting to have this Honorable Court do.

Another case which is controlling upon the constitutional questions is Highland Farms Dairy, Inc., v. Agnew et al, 300 U.S. 608.

In short, the cases are legion upholding the constitutionality of such regulatory acts and the Appellant, as the District Court said, has failed to sustain the burden of proof that there has been an illegal application of Appellee's power to establish minimum prices upon Appellant.

The Appellant, in its Jurisdictional Statement, is inaccurate in representing to this Court that Appellee requires Appellant to pay a fixed price of $.61 per gallon for milk it sells to federal military installations in violation of the Federal Procurement Statutes and Article VI, Section 2, of the United States Constitution. Nowhere in Chapter 501, Florida Statutes, is there any control attempted of this nature. Appellee has no order now or at the time when the District Court heard this cause which remotely regulates the price of "military milk" in any possible way. This would appear to be an attempt by Appellant to bring a hypothetical situation before this Court which we respectfully suggest should not be entertained. Crowell v. Benson, 285 U.S. 22; Champlin Ref. Co. v. Corporation Comm., 286 U.S. 210; Anniston Mfg. Co. v. Davis, 301 U.S. 337. The District Court properly found the foregoing to be correct from the testimony.

Appellants attempt to show that the regulatory fee imposed on milk distributed by Appellant to military installations is a tax imposed by the State of Florida on the United States and thus violates the Supremacy Clause, Article I, Section 8, Clause 17 of the U. S. Constitution is wholly without merit.

This Honorable Court has held in Texas Co. v. Brown, 258 U. S. 466, and Baldwin v. Seelig, 294 U. S. 511, that a regulatory fee may only be attacked if it is so excessive as to constitute a tax for revenue purposes and thus impose a burden on interstate commerce. This regulatory fee *cannot* possibly constitute a tax for revenue.

As the District Court held, this regulatory fee is based upon the privilege of doing business in the State of Florida and not a tax upon milk and thus, does not unduly burden interstate commerce nor violate the Supremacy Clause even though Appellant delivers milk to United States military installations. Indeed, this contention is conclusively belied by Section 501.09(8), Florida Statutes, which provides:

"If at any time during a fiscal year the revenue received by the Commission under this Chapter exceed by at least twenty-five per cent (25%) the total amount of expenditures as budgeted by the Commission for that fiscal year, the payment of taxes provided for **** in 501.09(4), on milk distributed by distributors, will be discontinued **** for the calendar months remaining in that fiscal year ****."

As clearly shown by the above statute itself, the sums collected here can never reach the State's general revenue and the tax or fee abates when the inspection and regulation board is assured of sufficient funds for that purpose. This question has been answered by the Attorney General of Florida in Opinion No. 056-43, February 16, 1956. A very similar situation was also present in U. S. v. Lee, 13 So. 2nd 919, where a similar regulatory fee on gas dealers was upheld as being constitutional.

Thus, it is clear that this tax is upon a regulated licensee and not upon the United States. It is also clear that the funds are to be used solely for the purpose of inspecting and regulating this critical industry and not to raise revenue. Corpus Juris Secundum, Vol. 15, page 58, states:

"As an incident to its power to make valid inspection laws, a state may charge a fee reasonably sufficient to meet the expenses of the inspection and such a fee is not properly assailable as a burden on interstate commerce."

As an authority for this comment, U. S. Pure Oil Company v. State of Minnesota, 63 Lawyers' Edition 180 is cited.

Appellees respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Richard W. Ervin
Attorney General, State of Florida

Joseph C. Jacobs
Assistant Attorney General

PROOF OF SERVICE

I, JOSEPH C. JACOBS, one of the attorneys for the FLORIDA MILK COMMISSION, and CHARLES O. ANDREWS, JR., et al, Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of January, 1963, I served a copy of the foregoing Motion to Affirm, on the several parties hereto by mailing a copy in a duly addressed envelope, air mail, postage prepaid, to their respective attorneys of record, as follows: JOE J. HARRELL, of Jones and Harrell, 201 East Government Street, Pensacola, Florida, and J. A. McCLAIN, JR., Suite 615, Marine Bank Building, Tampa, Florida, Attorneys for Polar Ice Cream and Creamery Company, Pensacola, Florida.

JOSEPH C. JACOBS
Assistant Attorney General
for the State of Florida,
Attorney for Florida Milk
Commission,
Tallahassee, Florida

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTION, STATUTES AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	4
ARGUMENT	
QUESTION ONE	6
QUESTION TWO	16
QUESTION THREE	19
QUESTION FOUR	20
CONCLUSION	26
PROOF OF SERVICE	27
APPENDIX:	
APPENDIX "A"—Pertinent Portions of Constitution of the United States	29
APPENDIX "B"—Federal Statutory Provisions	31
APPENDIX "C"—Federal Regulations	33
APPENDIX "D"—Pertinent Florida Statutory Provisions and Legislative History	44
APPENDIX "E"—Pertinent Georgia Statutes	51
APPENDIX "F"—Recent Newspaper Articles and an Editorial Relating to Florida-Alabama Milk Dispute	54

CITATIONS

Cases

	Page
Adams v. Tanner, 244 U.S. 590	24
Baldwin v. Seelig, 294 U.S. 511	8, 15
Borden, et al, v. Odham, 121 So. 2d 625	14
Dean Milk Company v. City of Madison, 340 U.S. 349	15
Lehigh Valley Co-op. Farmers, Inc. v. United States, 370, U.S. 76	15, 22
Massachusetts v. Mellon, 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597, Headnote 5	24
Nebbia v. New York, 291 U.S. 502, 79 L.Ed. 940	21
Nev-Cal Electric Securities Co. v. Imperial Irr. Distict, 85 Fed.2d Cert. Denied 300 U.S. 662	7
Pacific Coast Dairy v. Department of Agriculture, 313 U.S. 285	17
Paul v. United States, ____ U.S. ____, 83 S.Ct. Rpt. 426	17, 19
Penn Dairies, Inc. v. Milk Control Commissioners of Pennsylvania, 318 U.S. 261	19, 20
Polar Ice Cream & Creamery Co. v. Charles O. Andrews, et al. & Florida Milk Commission, 208 Fed.Sup. 899	1
Public Utilities Commission of the State of California v. United States, 355 U.S. 534	17, 20
United States of America v. Warne, 190 Fed.Supp. 645	19

CITATIONS — Continued
Constitution and Federal Statutes

	Page
CONSTITUTION OF THE UNITED STATES:	
Article I, Sec. 8, Cl. 3, (Commerce Clause)	2, 6
Article I, Sec. 8, Cl. 17	3, 4, 5, 16, 17
Article VI, Clause 2, (Supremacy Clause)	3, 16, 19
Fourteenth Amendment	3, 20
FEDERAL STATUTES:	
28 U.S.C. 1253	2
Argicultural Marketing Act of 1937,	
7 U.S.C. Sect. 608c	15
7 U.S.C. Sect. 608c	15
Section 8c(5)(G)	15
Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. 2031, et seq.	3, 19

Florida Statutes

Chapter 501, Florida Statutes	2, 3, 4, 5, 6, 7, 14, 16, 19, 20, 22, 23
Section 501.05(3)	6
Section 501.13(8)	8
Section 501.21	23
Chapter 502, Florida Statutes	22

In The Supreme Court of the United States

OCTOBER TERM, 1962

NO. 601

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY OPPOSING MOTION TO AFFIRM

OPINION BELOW

The opinion of the District Court is set forth verbatim at Page 15 of the Appendix to the Jurisdictional Statement of Appellant. The Opinion of the District Court is reported at 208 F. Supp. 899.

JURISDICTION

The judgment or decree sought to be reviewed was entered on July 26, 1962. The Notice of Appeal was filed on September 21, 1962, in the United States District Court for the Northern District of Florida. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Constitution of the United States which this case involves are set forth in Appendix "A", infra, Pages 29, 30.

Pertinent Federal statutory provisions are set forth in Appendix "B", infra, Pages 31, 32.

Pertinent Federal regulations are set forth in Appendix "C", infra, Pages 33-43

Pertinent Florida statutory provisions and legislative history are set forth in Appendix "D", infra Pages 44-50.

QUESTIONS PRESENTED

ONE

Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

TWO

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violate Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States and Federal Procurement statutes and policy.

THREE

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflict with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat. 22, 10 USC 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

FOUR

Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Appellant of property without due process of law.

(2) That it denies to the Appellant equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the the Appellant.

STATEMENT

This is a direct appeal from the judgment of a Three-Judge court convened in the Northern District of Florida to hear an action brought by Polar Ice Cream & Creamery Company, praying for an injunction and for an order declaring Chapter 501, Florida Statutes, 1961, and rules and orders issued pursuant thereto, to be null and void and unconstitutional. The testimony taken in the cause was transcribed and copies of the transcript were delivered to each of the three judges prior to the time of their decision.

Polar Ice Cream & Creamery Company is a milk distributor whose plant is located in the State of Florida sixteen miles from the Alabama State line. Under the Florida Milk Commission, a base system was instituted whereby each Florida producer who sold milk to the Appellant, Polar Ice Cream & Creamry Company was allotted a certain percentage of Class I sales, which are sales of fluid milk for human consumption, The base percentage was computed so as to give Florida producers 100% of the Class I sales, and Alabama producers, or producers from other states, were allowed no percentage of Class I sales. The base system, as instituted by the Florida Milk Commission, was computed on a percentage of Class I sales and not on a gallonage basis.

Prior to coming within the jurisdiction of the Florida Milk Commission, Appellant had various government contracts for the furnishing of milk to military installations. Contracts with Tyndall Air Force Base and with Fort Benning, Georgia, were introduced into evidence. The United States has exclusive jurisdiction to both of these installations, pursuant to Article

I, Section 8, Clause 17, of the Constitution of the United States. The contract with Fort Benning was in the aggregate amount of $1,760,000.00 and obligated the appellant to supply milk delivered at 58c a gallon. The Florida Milk Commission entered an order requiring the payment of 61c a gallon to Florida milk producers for Class I milk.

The Appellant also contracts with the Navy Mine Laboratories at Panama City, Florida, exclusive jurisdiction to which had not been ceded to the United States.

Much milk from Alabama is sold in the Pensacola milk marketing area. The testimony revealed that more than 150,000 gallons of Alabama milk was delivered in Florida in the month of November, 1961. Alabama milk could be bought by Pensacola distributors for 35c a gallon.

The orders and regulations of the Florida Milk Commission required appellant, and other Florida milk distributors, to purchase all of the milk offered by Florida base producers for Class I use before purchasing milk from outside the state to be utilized in Class I channels and to pay 61c per gallon for such milk. This requirement also applied to any Florida milk delivered to a military installation either within or without the State of Florida, and whether on a military reservation exclusive jurisdiction to which had been ceded to the United States or not.

A tax of 15c per 100 gallons is imposed for each gallon of Florida milk sold and delivered, even to a military installation exclusive jurisdiction to which had been ceded to the United States.

The Florida Milk Act (Chapter 501, Florida Statutes, 1961) was passed under the police powers of the State of Florida and as an emergency measure (A-44).

There was evidence that milk is in tremendous surplus and that a surplus condition has existed for the past ten years.

The Appellee filed a Motion to Affirm on the grounds that the questions are so unsubstantial as not to warrant further argument. This brief is filed in opposition to that motion.

ARGUMENT

QUESTION ONE

Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

The legislature of the State of Florida in 1933 passed the first Milk Act as an emergency measure, and thereafter, the Act has been re-enacted with various changes until 1961, at which time the Act was amended and Chapter 501.05(3) (Appendix "D") commonly called the Just Cause provision, was added to the Act.

Although there was a legislative finding to the effect that there existed a continuing emergency, this finding failed to take into consideration the fact that the production of milk was in tremendous surplus, and it was readily apparent that the entire Act was designed to protect, isolate and insulate the Florida milk producers from competition with milk producers outside of the State of Florida.

Hence, the orders that have been issued by the Commission, and particularly the ones in question in this

case, demonstrate that the aforesaid objective is what the Milk Commission has been and desperately is attempting to achieve.

The evidence showed that the percentage bases allocated to Florida producers gave such producers 100% of the Class I sales, which is the highest classification of milk for human consumption. Distributors also were required to pay 61c per gallon for such milk. The Administrator of the Florida Milk Commission readily admitted (Page 121 of the transcribed testimony) that such base relationship was designed to give preferential treatment to the Florida producers, as compared to producers in Alabama, or in other states. The Administrator further admitted that if the milk were sold to a military installation, whether within or without the State of Florida, the Appellant would have to pay the Florida producer for such milk at the Class I price of 61c per gallon.

What everybody knows, the Courts are presumed to know, and of such matters may take judicial cognizance. **Nev-Cal Electric Securities Co. v. Imperial Irr. District, 85 Fed. 2d Certiorari denied, 300 U.S. 662.**

It would therefore seem proper for the Court to recognize the effectiveness of the orders of the Florida Milk Commission insofar as the insulation of Florida producers is concerned, with the resulting impediment to the flow of interstate commerce.

One of the strongest arguments in support of Appellant's position that Chapter 501, Florida Statutes, and the orders arising thereunder are unconstitutional, is reflected in the dispute now raging between the State of Alabama and the State of Florida. The newspaper articles contained in Appendix "F" at Pages 54-57 reflect the vice inherent in such orders and have alerted this entire community to the fact that unless the evils complained of are corrected, reprisals against Florida citrus can well be expected.

Florida Statute 501.13(8), Appendix "D", Page 44, contains virtually the exact language of the New York statute which Mr. Justice Cardozo, speaking for a unanimous court, struck down in **Baldwin v. Seelig**, 294 U.S. 511. The Appellee has contended that the Commission has not attempted to enforce this specific portion of the Statute, but such a position overlooks the fact that it has attempted to control the price at which Florida milk may be sold ouside the State of Florida, and to discriminate against out-of-state producers who can never acquire a "base" with the Appellant. Also, if the Appellant should attempt to assign any part of its Class I sales to an Alabama producer, the Appellant would be in violation of the Commission's Orders and would be subject to having its license suspended or revoked and to having other sanctions and criminal penalties enforced against it.

The orders, rules and regulations of the Florida Milk Commission are continuing, certain restraints, by which the Appellant milk distributor is constrained by economic considerations from securing its supply of milk from out-of-state sources whenever it chooses to do so, and in addition thereto, Appellant is required to pay 61c per gallon for milk of the same quality and purity that could be obtained from the State of Alabama having a price of 35c per gallon.

The base relationship between the Appellant and its Florida producers is a continuing and permanent one. It cannot be terminated except for just cause, and economic or business reasons do not constitute just cause.

The lower court, in its Opinion, said:

> "The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, and this is what the plaintiff would have us do."

It is respectfully submitted that insofar as this Appellant is concerned, the evidence clearly revealed facts, many of them undisputed, which reflected that as to this Appellant, the injury, or threat of injury, was not hypothetical, but was real. A few examples may well illustrate this particular situation:

(1) Mr. Fisher, the Administrator of the Florida Milk Commission, was interrogated about the fact that the base percentage figures of Exhibit "L" of the plaintif's complaint set forth its various producers' percentages, which totaled 100% of the Class I milk sales to be divided among the various Florida producers, and, when asked if the Florida Milk Commission would require the Polar Company to pay to the Pensacola producers that have this so-called relationship, the percentage shown opposite each producer's name of the Class I sales, answered:

> "As a contractual relationship between the distributor and the producer, we would require that."

Then the following interrogation and testimony by Mr. Fisher took place: (Transcript of Testimony, Page 121, 133 and 123)

> "Q And no Alabama producer would have protection, would it?
>
> A Not necessarily.
>
> Q The Florida producer then would come first with respect to getting it so far as your order is concerned, with getting this percentage of the Class I sales, as a first cut?
>
> A In the base relationship, that is right.

Q And would be preferred over any other producer who may have delivered milk to that plant from Alabama, Mississippi, or what you?

A I would say, yes, because that is a contractual relationship between Polar Ice Cream & Creamery and their producers.

Q What do you mean by 'contractual relationship'?

A That is a contract whereby they have received or accepted milk over a period of time, and it is usually set up on a, during a base period which is September, October and November in the Pensacola area, and that is when your bases were open, however, they are now frozen, and we have taken those bases that were established by a previous course of dealing.

Q You mean to tell me that the Commission hasn't ordered the Polar Company to pay these percentages?

A Will you repeat that question?

Q Do you mean to tell me that the Polar Company is not under Commission order to pay these percentages and this is something of a voluntary contractual relationship?

A It is a contractual relationship. We have audited those figures and prepared those bases.

Q You have ordered them to pay those percentages, have you not?

A Right.

Q And if they don't pay them what do you do?

A Well, I can imagine we will have a Show Cause Order.

Q You will cite them with a Show Cause Order as to why their license shouldn't be suspended or revoked if they don't pay these percentages as set forth in this letter, is that correct?

A I don't believe that they are contesting those percentages.

Q I am asking you a question and I want an answer. If they don't pay these percentages would you not cite them to Show Cause?

A Yes, I think we would."

The newspaper articles and editorial contained in Appendix "F" hereof also refute the Conclusion of the lower court that the application of the law was hypothetical.

2. When asked if milk sold under a bid to a military installation would be classified as Class I, Mr. Fisher, the Administrator of the Florida Milk Commission, replied that if they used producer milk, that would be Class I, yes, at 61c per gallon. At Pages 124 and 125 of the Transcript of Testimony, is found the following interrogation of Mr. Fisher:

"Q And you would require the Polar Company then to account to the producers for that milk sold to Ft. Benning camp just as Class I milk and you would take that percentage up to these people named and you would count that in your auditing computation?

A It takes the Classification of Class I milk, it is for human consumption, and we would take that in if they used their producers milk.

Q It would be 61c a gallon?

A Yes, and they know that when they use it.

Q Now, do you impose a tax of any kind upon this milk that is bid and sold to military installations?

A That's a regulatory fee."

Thereafter, Mr. Fisher was further interrogated as follows: (Transcript of Testimony, Page 127)

"Q Now, Mr. Fisher, are you aware of the fact that the Alabama distributors do sell in the Pensacola marketing area in competition with the Polar Company?

A Yes sir.

Q Are you aware of the fact that the Alabama producers, the distributors can buy milk at cheaper prices?

A Yes sir.

Q At the present time are you not trying as the Commission to work out some sort of an arrangement with the Alabama Milk Control Board in which to try to solve the Pensacola problem?

A We have tentatively set up a date.

JUDGE JONES:

What has that got to do with this case?

MR. McCLAIN:

It only shows, Your Honor, the fact that there is an Interstate Commerce question."

4. At the request of Judge Jones of the lower Court, counsel for Appellees attempted to clear up the contractual relationship betwen the parties, as follows: (Transcript of Testimony, Pages 129-130)

"Q Now, Mr. Fisher, you testified that you considered this base relationship between a distributor and its producers to the contractual relationship based upon a previous course of business dealings, would you amplify that insofar as the position of the Florida Milk Commission is concerned?

A Well, it is the position of the Milk Commission that they are more or less a referee in seeing the contractual relationships are lived up to by both parties.

Q You mean then, Mr. Fisher, that the State has by this statute created the relationship between them and defined the rules under which it will be supervised and then calls this base a property right, is that correct?

A I think so, yes.

Q You didn't intend to suggest to the Court that there is a separate written instrument voluntarily entered into between the distributor and the producers?

A No sir."

The Court's attention is respectfully called to the fact that the Appellant, in its complaint, prayed for a temporary restraining order, and thereafter a perma-

nent injunction, and the prayer further contained a request that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, be declared and adjudged to be null and void, unconstitutional and of no effect. It is an elementary principle of law that an injunction will issue against a threatened harm or wrong, and certainly, from the foregoing testimony, the injury or threat of injury to the appellant is amply reflected. Appellant is entitled to lawfully operate its business without fear of loss of license because of unlawful acts of Appellees and Courts should ever be open to grant protective relief.

As heretofore stated, the base relationship thrust upon appellant by order of the Florida Milk Commission was set forth in a percentage ratio, totaling 100% of Class I sales for Florida producers, and is not confined to a certain number of gallons delivered to Appellant by its Florida producers. Thus, there is no way of predicting or determining what gallonage of milk the appellant must at any future time accept from its Florida producers and pay for at Class I prices. Obviously, if the Florida producers should increase the size of their herds, the gallonage would go up without limitation. Thus, the appellant finds itself in a position of having to take an ever increasing amount of Florida milk at a price of 61c a gallon, even though Alabama milk or milk from other states, of equal quality and purity, could be purchased at 35c per gallon.

The fact that the Appellant can be forced to accept all milk tendered by a producer has been upheld by the Supreme Court of Florida in the case of **Borden, et al, v. Odham, 121 So.2d 625.** The Florida milk law and the Commission have given preferential economic treatment to the Florida milk producer. He is protected from competition of out-of-state milk. There has been raised an economic barrier against the free import of out-of-state milk.

As stated by Mr. Justice Cardozo in **Baldwin v. Seelig, 294 U.S. 511:**

> "It is the established doctrine of this Court that a State may *not, in any form* or under any guise, directly burden the prosecution of interstate business. . . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' . . . If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

This Court in **Dean Milk Company v. City of Madison, 340 U.S. 349,** said:

> "In thus erecting an economic barrier protecting a major local industry from competition without the state . . . plainly discriminates against Interstate Commerce."

This Court in the recent case of **Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76,** had occasion to consider the provisions of **Section 8c(5)(G) of the Agricultural Marketing Act of 1937, 7 U.S.C. §608c,** which provides:

> "No market agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The Court thereafter recognized the plain mandate of the Congress in providing against action which would stop the free flow of commerce of dairy products and struck down a compensatory payment provision of a federal milk marketing order.

In view of the foregoing analysis of the Florida milk regulatory action, can there be any doubt that the interstate flow of milk is unduly burdened and obstructed by the subtly conceived and cleverly administered scheme designed to isolate and insulate the Florida producer from competition with out-of-state milk? Certainly the orders of the Milk Commission in applying the statute were so flagrantly violative of the Constitution as to entitle the Appellant to the injunctive relief prayed for, which was denied by the Court below.

QUESTION TWO

> Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violates Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States and Federal procurement statutes and policy.

The case of **Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285,** held that the United States Constitution prohibited California from applying its minimum milk price regulations to sales consummated on lands over which the United States had acquired exclusive jurisdiction.

In **Public Utilities Commission v. United States, 355 U.S. 534,** this Court held that a state system of price regulation could not be applied to procurement by the United States, in view of the Federal policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefits of competition among and free bargaining with private sellers of supplies or services.

The case of **Paul v. United,** .....**U.S.**....., **83 S.Ct.Rpt. 426,** held that state price regulations were not applicable to sales of milk to the United States at military installations exclusive jurisdiction to which had been ceded to the United States.

In the Paul case, the question of producers' prices was not in issue, but the dissenting opinion, in Footnote 5, recognized the pertinency of the argument that the fixing of minimum producer prices would be in conflict with the court's view of federal procurement policy and said:

> "It should be noted that the Court's decision today is likely to affect federal as well as state price regulation. For example, a large part of the milk marketing regulation in the United States is presently accomplished under federal marketing orders pursuant to § 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c, 7 U.S.C.A. § 608c. See 7 CFR 1001 et seq. Federal marketing orders typically maintain minimum producer prices, and this regulation, in turn, has the effect of

maintaining a certain level of handler prices. See, eg., Lehigh Valley Co-op Farmers, Inc. v. United States, 370 U.S. 76, 78-83, 82 S.Ct. 1168. 1170-1172, 8 L.Ed.2d 345. It is perhaps for this reason that the Government has abandoned its attack upon California's producer price regulation in the present case. The Govevrnment's change of position, however, is only a matter of discretion, and it can hardly be contended that a scheme of producer price maintenance would be any less in conflict with the Court's view of federal procurement policy."

The whole theory of the federal procurement policy is bottomed upon the necessity of full and free competition, and free bargaining, in order that the federal government may obtain the services and supplies it needs at the lowest overall cost to the United States. If Florida milk distributors are required to pay a minimum of 61c per gallon for milk of Florida producers used on military installations, such a requirement would, for all intents and purposes, eliminate Florida distributors from bidding on military milk contracts, if Florida milk were used. It is a matter of plain common sense that regulation of the price required to be paid by distributors to producers would certainly be projected in the bid of the distributor, so as to force the distributor to bid proportionately higher, which would conflict with the federal procurement policy.

Fort Benning, Georgia, Tyndall Field Air Force Base, Florida, and the Naval Air Station at Pensacola, Florida, are all military installations acquired in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, and the United States has exclusive jurisdiction of such military bases.

QUESTION THREE

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflicts with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat. 22, 10 USC 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

Even if the Navy Mine Laboratory, located in Bay County, Florida, is situated on land which has not been ceded to the United States of America, the regulatory aspects of the Florida Milk Act would, nevertheless, not be applicable to milk delivered to that installation.

The case of **United States of America v. Warne, 190 Fed. Supp. 645**, holds that the California Milk Stablization Act:

> "Places a prohibition on the Federal Government";

within the meaning of the "Public Utilities Case", and therefore so far conflicts with federal procurement statutes and policies as to be invalid under the Supremacy Clause, Article VI, Section 2, Constitution of the United States.

This view is supported by the case of **Paul v. United States, ... U.S....., 83 S.Ct.Rep.426**, which contains a definitive examination of federal procurement policy. In the Paul case, the Court clearly recognized that subsequent to the case of **Penn Dairies, Inc. v. Milk Con-**

trol Commissioners of Pennsylvania, 318 U.S. 261, and before the Public Utilities Commissioner of the State of California v. United States, the federal procurement policy was revised and restated, and a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments was passed by the Congress. The revision holds to the time-tested method of competitive bidding, and as was stated by the Court, the Paul case is not opposed to Penn Dairies, Inc. v. Milk Control Commissioners of Pennsylvania.

QUESTION FOUR

Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Appellant of property without due process of law.

(2) That it denies to the Appellant equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the Appellant.

The original Florida Milk Act was passed in the Depression years under an emergency condition, when this nation was in the throes of an economic depression. No such emergency now exists.

What would be a valid use of the police power of the state in an emergency would be an invalid exercise of power in defiance of the Constitution and the rights of the people guaranteed thereby after the emergency ceased.

The landmark case of the advocates of milk regulation is the case of **Nebbia v. New York, 291 U.S. 502, 79 L.Ed. 940.** Admittedly the New York statute which was challenged was an emergency measure passed during the depression years. The New York Court of Appeals, as is set forth in the dissenting opinion of Mr. Justice McReynolds, specifically recognized the fact that the act was passed as an emergency measure.

Thereafter, in a five to four decision, the Act was upheld by this Court in an opinion which recognized that:

> "a regulation valid for one sort of business or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

A strong dissenting opinion was written by Mr. Justice McReynolds where he traced the hazard of failing to protect constitutional guarantees under the guise of an emergency, and said:

> "What circumstances give force to an 'emergency' statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If three days after this act became effective another 'very grievous murrain' had descended and half of the cattle had died, would the emergency then have ended, also the prescribed rates? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? **Or are producers alone to be considered, consumers neglected?** To these questions we have no answers. When emergency gives potency, its subsidence must

disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will it disappear?"

How prophetic he was! Yet how true was his prophesy. For today in the face of an overwhelmingly surplus of milk, Florida milk producers now demand and receive 61c per gallon of milk, which is the highest price in the United States, when milk from Alabama of the same quality can be purchased for 35c per gallon — "Are the producers alone to be considered, consumers neglected?", as suggested by Mr. Justice McReynolds?

The Florida Milk Commission answers "Yes". Reason, good conscience, and the Appellant cry "No"!

There is now no need for the Florida Milk Act, as set forth in **Chapter 501, Florida Statutes.**

This Court in the case of **Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76,** recognized the surplus in the milk industry, and the evidence in this case shows that there is now a surplus in the milk industry and there has been for a period of ten years.

This Court can well take judicial notice that there is a tremendous surplus of milk and dairy products, and the evidence amply sustains this statement.

Chapter 501, Florida Statutes, regulates the **economic aspects** of the milk business, and in no way touches the requirements insofar as a pure, wholesome and sanitary criteria is concerned.

Chapter 502, Florida Statutes, contains a comprehensive code for milk, cream and milk products, which deals definitively with such matters as comprehensive definitions of all types of milk and milk products, labeling requirements, and provisions for inspection of milk which is produced within and without the State

of Florida. The Commissioner of Agriculture has the duty of enforcing the regulations with respect to purity of milk, and milk products, and this matter is wholly outside the purview of the powers granted to the Florida Milk Commission by reason of **Chapter 501, Florida Statutes.**

It is thus all too apparent that there is no need for a Milk Control Act to (1) preserve public health, (2) morals, (3) safety and welfare.

It cannot be argued that the welfare of the citizens of Florida at large could be promoted by forcing a distributor to purchase milk from a producer at 61c per gallon, which is the highest price for the sale of such milk in the United States of America.

There was evidence that the surplus condition in the milk industry is getting worse and that milk could be sent from Northwest Wisconsin with a 36 hour delivery in Pensacola, which would be approved by the United States Department of Health services, and would meet the health requirements of the State of Florida. It is, therefore, clear that there is no problem with respect to a pure and wholesome milk supply.

Chapter 501.21, Florida Statutes states that there is a continuing emergency and need for the existence of the Florida Milk Act, that it shall be effective until such time as it shall be appealed or amended by some subsequent act of the legislature. (Appendix "D", Page 47).

Therefore it can be reasonably inferred that the Legislature presumed that there was a continuing emergency, but it is respectfully submitted that the evidence taken in this case conclusively rebuts that presumption.

Legislation must be reasonable in the sense that it must be based on reason as distinct from being wholly

arbitrary or capricious. It therefore follows that if the statute or regulation is unreasonable it cannot be enforced.

Legislative determination is conclusive upon the courts only within constitutional limits, which leaves open for judicial inquiry all questions as to the actual effect of attempted police measure upon constitutional rights. **Adams v. Tanner, 244 U.S. 590.**

Since the judicial branch of the government ascertains the validity of all legislation as measured by the Federal and State constitutions, and since the police power is subordinate to the organic law, the broad scope of the power does not place every regulation touching it within legislative competence, because of the power of the courts to determine whether legislative action conflicts with the organic law or is arbitrary and unreasonable and therefore void. Hence, a determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts.

The Appellant is well aware of the rule as well set forth in **Massachusetts v. Mellon, 262 U.S. 447, L.Ed. 1078, 43 Sup.Ct. 597, Headnote 5**, as follows:

> "To invoke judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The present position of the Appellant certainly falls well within the requirements of this rule, as evidenced, among other things, by the following:

1. It has been ordered to take all milk produced by its allocated Florida producers, pay the percentage ratio to each producer, as set forth on Exhibit "L" of

the Complaint and pay 61c per gallon for each gallon of milk used in Class I consumption, even though it could purchase milk of identical quality and wholesomeness from Alabama or elsewhere at a price of 35c per gallon.

2. That it is in direct competition in Class I sales on the streets of Pensacola with Alabama distributors who can purchase milk from Alabama producers and sell the same in Florida at a much less price.

3. That it is forced into a contractual relationship, created solely by the Milk Commission, which it is not free to terminate except by showing just cause acceptable to the Commission.

4. That it must pay 61c for each gallon of Florida milk purchased, delivered to a military installation, whether within or without the State of Florida.

5. That a tax of 15c per 100 gallons is now imposed on it for each gallon of Florida milk sold, whether to a military installation or in other trade channels.

6. That in event of a violation of any rules or regulations of the Milk Commission, the Appellant can be subjected to loss of license, as well as criminal penalties, and at the time of the decision of the lower court, there was pending against it a Show Cause Order why its license should not be terminated for failure to so comply with the provisions of Chapter 501, Florida Statutes, and the Orders of the Milk Commission. And thereafter an order of the Milk Commission was entered revoking Appellant's license, which order is presently being appealed to the District Court of Appeals of Florida, First District.

The Florida Milk Act and action of the Commission thereunder deprive the Appellant, without due process of law, of its liberty of contract, its property, and also deny equal protection of the law.

CONCLUSION

For the foregoing reasons, there are substantial federal and constitutional questions involved, and it is submitted that an Order should be entered noting probable jurisdiction, or postponing consideration of the question of jurisdiction to the hearing of the case on the merits, and thereafter, that the decision of the lower court be reversed.

Respectfully submitted,

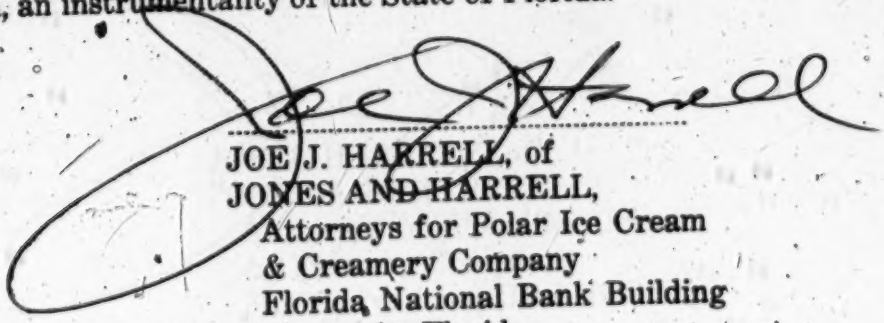
JONES AND HARRELL
Florida National Bank Building
Pensacola, Florida

By .....
JOE J. HARRELL

J. A. McCLAIN, JR.
Suite 615, Marine Bank Building
Tampa, Florida,
Attorneys for Appellant.

PROOF OF SERVICE

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20 day of February, 1963, I served a copy of the foregoing Brief in Opposition to the Motion to Affirm, together with Appendix, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.



JOE J. HARRELL, of
JONES AND HARRELL,
Attorneys for Polar Ice Cream
& Creamery Company
Florida National Bank Building
Pensacola, Florida

APPENDIX "A"

CONSTITUTION OF THE UNITED STATES

The pertinent portions of the Constitution of the United States are as follows:

ARTICLE I, Section 8, [Clause 3] — To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

ARTICLE I, Section 8, [Clause 17] — To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

ARTICLE VI, [Clause 2] — This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT 14

(Adopted July 28, 1868)

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "B"

FEDERAL STATUTORY PROVISIONS

The pertinent Armed Services procurement provisions are 70A Stat. 127-133, as amended, 10 U.S.C. 2301-2314. Section 2304 provides:

> 2304. Purchases and contracts: formal advertising; exceptions.
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * *
>
> (8) the purchase or contract is for property for authorized resale;
>
> (9) the purchase or contract is for perishable or nonperishable subsistence supplies;
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * * *
>
> (15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate: (B) the negotiated price is lower than the lowest rejected

bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

* * * * * * *

Section 2305 provides:

* * * * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageou sto the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * * * *

APPENDIX "C"

FEDERAL REGULATIONS

The Armed Services Procurement Regulations provide in pertinent part:

1-301 **Methods of Procurement.** It shall be the objective to use that method of procuremen which will be most advantageous to the Government—price, quality, and other factors considered. Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent, in accordance with the policies and procedures set forth in this Regulation. Procurement shall be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, in accordance with the detailed requirements and procedures set forth in Section II; except that procurement may be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Section III. Procurement may also be effected, as provided in Sections IV and V, by such means as coordinated procurement or interdepartmental procurement.

* * * * * *

1-302.2. **Sources Outside the Government.** Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals

("bids" in the case of procurement by formal advertising, "proposals" in the case of procurement by negotiation) shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the Military Department concerned, and thereby to obtain for the Government the most advantageous contract — price, quality, and other factors considered.

• • • • • •

3-100 **Scope of Part.** This Part deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

3-101 **Negotiation As Distinguished From Formal Advertising.** Whenever supplies or services are to be procured by negotiation, price quotations (see ASPR Section XVI, Part 2), supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the contracting officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Section I, Part 3, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by contracting officers and their

negotiators, with the attention being given to the following and any other appropriate factors:

(i) comparison of prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to production costs, including extra-pay shift, multi-shift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(ii) comparison of the business reputations, capabilities, and responsiblities of the respective persons or firms who submit quotations (see ASPR 1-903);

(iii) consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(iv) consideration of delivery requirements (see ASPR 1-306);

(v) discriminating use of price and cost analyses (see ASPR 16-206);

(vi) investigation of price aspects of any important subcontract;

(vii) individual bargaining, by mail or by conference;

(viii) consideration of cost sharing;

(ix) effective utilization in general of the most desirable type of contract and in particular of contract provisions relating to price redetermination (see Section III, Part 4);

(x) consideration of the size of the business concern (see ASPR 1-302.3 and 3-104);

(xi) consideration as to whether the prospective supplies is a planned producer under the industrial mobilization program;

(xii) consideration as to whether the prospective supplies requires expansion or conversion of plant facilities;

(xiii) consideration as to whether the prospective supplier is located in a surplus or scarce labor area (see ASPR 3-105);

(xiv) consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(xv) consideration of the extent of subcontracting;

(xvi) consideration of the existing and potential workload of the prospective supplier;

(xvii) consideration of broadening the industrial base by the development of additional suppliers;

(xviii) consideration of whether the contractor requires Government-furnished property, machine tools, or facilities; or Government-operated test facilities;

(xix) consideration of contract performance in facilities located in dispersed sites; and

(xx) advantages or disadvantages to the Government that might result from making multiple awards.

3-102 General Requirements for Negotiation. No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

(i) the contemplated procurement comes within one of the circumstances permitting negotiation enumerated in Section III, Part 2;

(ii) any necessary determinations and findings prescribed in Section III, Part 3, have been made;

(iii) such business clearance or approval as is prescribed by applicable Departmental procedures has been obtained; and

(iv) the prospective contractor has been determined to be responsible in accordance with ASPR, Section I, Part 9.

* * * * *

Procurement by Negotiation

Part 8- Price Negotiation Policies and Techniques

* * * * *

3-801.1 General. It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Govenment. Sound pricing depends primarily upon the exercise of sound judgment by all personnel concerned with the procurement.

* * * * *

Army Procurement Procedure 3-101 provides:

3-101 Negotiation as Distinguished from Formal Advertising.

a. Competition. The fact that a procurement is to be negotiated does not relax the requirements for competition. When supplies or services are to be procured by negotiation and when consistent with the accomplishment of procurement objectives, quotations or proposals shall be solicited from all such qualified sources of (as defined in ASPR and APP 1-201.9) supplies or services as are deemed necessary to insure effective competition and to insure that the procurement is made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Part 3, Section I, ASPR and APP. Competition is not necessary in contracting for personal or professional services.

b. **Conduct of Negotiations.** Procurement by negotiation is less automatic than, and does not have the rigid limitations of, formal advertising bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the

supplier making the best final proposal and who has the requisite ability to perform.

• • • • •

(2) Negotiation will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed.

(3) During the negotiation of contracts, simultaneous coordination, to the greatest practical extent, shall take place among the contracting, technical, price analysis, legal, and industrial planning personnel. Instructions to be followed by negotiating teams will be prepared with full coordination of traffic management consultants in purchasing offices, and such teams will be directed to seek traffic management advice upon the appearance of new traffic elements (such as change in shipping points, specifications, etc.) in the negotiations.

• • • • •

c. Requests for Proposals.

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, contracting officers shall use DD Form 747 (Request for Quota-

tions) or a DD Form 746 (Request for Proposals and Proposal). See ASPR 16-201 and 16-208.

* * * * * *

Air Force Procurement Regulation, Paragraphs 2-000, 2-101, 2-102 provide:

2-000 Scope of Section. In recognition of the fact that formal advertising is the basic method of procurement by the Government, this Section gives detailed guidance to AF procurement personnel for adapting formal advertising procedures to use in fulfilling as many procurement requirements as possible. In particular, Part 20 sets forth many examples of special provisions which may be incorporated in Invitations for Bids to assure that the Government's requirements will be fully met and at the same time preserve the benefits of full and free competition which are inherent in formal advertising.

PART 1—USE OF FORMAL ADVERTISING

2-101 Meaning of Formal Advertising. Formal advertising involves three basic steps. First, the preparation of an Invitation for Bids, in the prescribed form, describing the requirement of the Government accurately and completely, but avoiding any limitations which have no reasonable relationship to the actual needs of the Government and which might tend to limit the number of bidders (see AFPI 2-201). Second, publicizing the Invitation for Bids through posting in public places, distributing to prospective bidders, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and

submit formal bids before the time slated for public opening of bids (see AFPI 2-202). Third, awarding the contract, on the basis of the bids publicly opened, to that responsive responsible bidder whose bid is most advantageous to the Government, price and other factors considered. (See Part 4 of this Section.)

2-102 USE FOR FORMAL ADVERTISING

(a) **Statutory Requirement.** 10 U.S.C. 2304 (a) provides that all contracts for supplies or services, with certain stated exceptions, will be made by formal advertising. (See ASPR and AFPI Section III, Part2 for discussion of the exceptions.)

(b) **House of Representatives Report.** The House Committee on Armed Services, section 2(e) of House Report No. 1688 (84th Congress, 2nd Session, January 1956) accompanying H.R. 8710, has stated as follows:

The amendment adds a new subsection. In it, we have stated positively the intention of Congress that all procurement shall be by advertised bidding. We have said, in clear language, that none of the exceptions 2(c) (1) through (17) shall be used by the agency head unless the facts and circumstances in justification thereof are clear and convincing.

We mean by this that "borderline" cases or "Grey areas," as they are sometimes referred to, and any case in doubt or uncertainty shall be resolved in favor of advertised competitive bidding and not by resorting to these 17 exceptions.

The Comptroller General, in his vigilant examination of the operation of this Act and of procurement practices generally, will, as the agent of Congress, be fully advised and fortified by this firm expression of congressional intent. And moreover, no agency head can now be in any doubt whatsoever as to what Congress expects of him. We cannot be more explicit.

We propose that the trend shall be toward advertised competitive procurement and that advertised competitive procurement will be the rule, that in every case in which the agency head or his subordinates look toward the exceptions of the Act, they are met with the expression of congressional intent in this act, as amended, that what they do must be supported by a justification which is both clear and convincing. And the Congress will examine the findings that are required under the act, from time to time, to determine whether this mandate is being followed. We are determined that the trend which prompted this inquiry, shall be reversed.

(c) Air Force Policy.

(1) The AF policy is to use formal advertising procedures whenever possible notwithstanding the existence of a negotiation authority under 10 U.S.C. 2304(a) and ASPR and AFPI Section III, Part 2. Thus negotiation authority will be used only when the facts and circumstances of the procurement clearly indicate the need to use the authority. For example, 10 U.S.C. 2304(a)(9) authorizes the procurement of perishable subsistence supplies by negotiation. Milk is perishable subsistence as defined in AFR 145-11 and Rulings and Interpreta-

tions of the Walsh-Healy Public Contracts Act, but troop issue requirements are adequately covered by specifications and competition is generally available, accordingly, such procurements of milk should be advertised when volume quantities are involved.

(2) Before the negotiation authority of ASPR 3-202 or 3-210 is used, officials approving determinations and findings (see AFPI 3-306(b) will satisfy themselves that formal advertising procedures cannot be used without detriment to the Government, and that the facts and circumstances in justification of negotiation are clear and convincing.

• • • • •

APPENDIX "D"

PERTINENT FLORIDA STATUTORY PROVISIONS AND LEGISLATIVE HISTORY

A. The entire Florida Milk Commission Act, Chapter 501, Florida Statutes, 1961, at Page 2220, is set forth in the Appendix to the Jurisdictional Statement. Some of the pertinent parts of the Act are as follows:

"501.01. Legislative finding; statement of policy. — This Chapter is enacted in the exercise of the police power of the state, and its purpose generally is to protect the public health, safety and welfare. It is declared that the production and distribution of milk, cream and other milk products in the state is an industry upon which to a large degree, the prosperity and health of the people of the state depend, and that the present economic emergency is in part a result of the disparity between the prices of milk, cream and milk products and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, and has broken down the orderly production and marketing of milk, cream and other milk products, and has seriously impaired the agricultural assets supporting the credit structure of the state and political subdivisions thereof; that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have grown up and have been carried on in the production, sale and distribution of milk, cream and milk products in this state which impair dairy industry in this state and imperil the constant supply of pure and wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of this state; that such conditions existed at the time of the creation of the milk control board and constituted a menace to the health, welfare and reasonable comfort of the inhabitants of this state, and will again consti-

tute such menace should all regulations as set forth in said law creating said board go out of existence. In order, therefore, to protect the well-being of our citizens, and to promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk, cream and milk products in the state is declared to be a business affecting the public health and interest of its citizens; and the production, transportation, manufacture, storage, distribution and sale of milk, cream and milk products to be a paramount industry upon which the prosperity of the state and the welfare of its citizens in a large measure depends. In order to correct abuses arising from the destructive and unfair manipulation of prices which are found to spring from a selfish disregard of the public interest in the manner of carrying on the dairy industry, which is an organized industry, it is found necessary to resort to the legislative remedy of regulating prices to save both producers and consumers from such manipulation of prices in the industry; because such practices amount to evils which menace the health, safety, and welfare of the people at large, this chapter is passed. It is further found that the acute economic emergency which existed at the time of the creation of the milk control board was partly the consequence of a severe and increasing disparity between the prices of milk and other commodities, as aforesaid stated; that such practices were and are curtailed by the existence of said board, but will immediately recur should said board and the regulations set up to be administered thereby pass out of existence; that the purchasing power of milk producers is in imminent danger of again being broken down and demoralized; that the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of interruption of public supervision and control in accord with proper standards of production, sanitation and marketing; that it is therefore necessary that said business be supervised and regulated by

proper legislation. The foregoing statement of fact, policy and application of this chapter are declared as a matter of legislative finding and determinaion.

History—§1, ch. 19231, 1939; CGL 140 Supp. 3219(38). cf.—Ch.502, Milk, cream and milk products.

501.05(3) The relationship between a producer and a distributor, under which milk produced by the producer is regularly delivered to and accepted by the distributor, when once established, shall not be terminated either by the producer or by the distributor without cause therefor, and the approval of the commission. Just cause will be considered by the commission as any cause deemed just by a prudent and reasonable man.

Arbitrary, capricious and vindictive reasons will not be considered as just cause for any such termination.

"501.09(4) . . . On or before the tenth day of each month each distributor shall make a report under oath to the commission upon such form and containing such information as the commission shall prescribe, but each report shall specifically, and in addition to all other information which may be required by the commission, contain and set forth:

(a) The number of gallons of milk produced; the number of gallons of milk received; and the number of gallons of milk distributed by such distributor during the preceding calendar month; and

(b) The name and address of each producer or any other person from whom the distributor purchased milk for distribution during the preceding calendar month and the quantity of milk purchased from each producer or other person, and the price per gallon paid to each producer or other person for milk so purchased,

and the number of gallons purchased by such distributor if such distributor be also a producer.

For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter. . . ."

501.13(8) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the sate, for sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful.

501.21. Duration of commission. — A continuing emergency for the regulation of the business and industry herein named shall be presumed and deemed continuing and existing, calling for the need for the existence of this chapter, and the same shall be effective until such date as it is repealed or amended by some subsequent act of the legislature, whenever any such continued emergency may be deemed essential to the continued validity of any of the provisions hereof.

501.23 Penalty for violations. — A violation of any provision of this chapter or of any rule or order of the commission lawfully made, except as otherwise expressly provided by this chapter, shall be a misdemeanor punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, and each day during which such violation shall continue shall be deemed a separate violation.

* * * * *

B. Chapter 25, Section 1 and Section 3, Laws of Florida, 1845, Pages 42, 43, and 44:

Section 1. Be it therefore enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened, That the United States be, and they are hereby authorized and empowered to purchase, acquire, hold, own, occupy and possess such land or lands within the limits of this State as they shall adjudge it expedient, and shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States, said purchases to be effected either by contract with the owner or owners of said land or lands, or in the manner hereinafter provided.

Section 3. Be it further enacted, That whenever the United States shall contract for, purchase or acquire any land or lands within the limits of this State for the purposes aforesaid, in either of the modes above mentioned and provided, and shall desire to acquire constitutional jurisdiction over such land or lands for said purposes, it shall and may be lawful for the Governor of this State, upon made to him in writing, on behalf of the United States, for that purpose, accompanied by the proper evidence of said purchase, contract, or acquisition of record, describing the land or lands

sought to be ceded by convenient metes and bounds, and the said Governor shall be, and he is hereby authorized and empowered, thereupon, in the name and on behalf of this State, to cede to the United States exclusive jurisdiction over the land or lands so purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess, and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever. **Provided, always**, that the consent aforesaid is hereby given, and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this State shall retain a concurrent jurisdiction with the United States in and over the land or lands to be ceded, and every portion thereof so far that all process civil or criminal, issuing under the authority of this State, or of any of the Courts, or judicial officers thereof, upon any person or persons amenable to the same, within the limits and extent of the land or lands so ceded, in like manner and to like effect, as if this act had never been passed; saving, however, to the United States security to their property within said limits and extent, an exemption of the same, and of said land or lands, from any taxation under the authority of this State, whilst the same shall continue to be owned, held, used and occupied by the United States for the purposes above expressed and intended, and not otherwise.

[Passed the Senate July 17th, 1845. Passed the House of Representatives July 21st, 1845. Approved by the Governor July 24th, 1845.]

* * * * *

C. **Florida Statutes, 1961, Page 3.**

§602. United States authorized to acquire lands for certain purposes. — The United States may purchase, acquire, hold, own, occupy and possess such lands within the limits of this state as they shall seek to oc-

cupy and hold as sites on which to errect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States; such land to be acquired either by contract with owners, or in the manner hereinafter provided.

History—§1, ch. 25, 1845; RS 7; GS 5; RGS 5; CGL 5.
cf.—§§6.06, 253.21, Swamp and forest lands.

§§264.06-264.10, Everglades National Park.

APPENDIX "E"

PERTINENT GEORGIA STATUTES

The Georgia law provides in pertinent part:

ACT NO. 373, Georgia Laws of 1927, Pages 352 and 353. U. S. GOVERNMENT, JURISDICTION CEDED TO.

NO. 373.

An Act to provide for the acquisition of land in the State of Georgia by the United States for governmental purposes; to cede jurisdiction to the United States under certain limitations; and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, and the consent of the State of Georgia is hereby given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government.

Section 2. Be it further enacted by the authority aforesaid, that the exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the State retains the right to serve thereon all civil and criminal processes issued under authority of the State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

Section 3. Be it further enacted by the authority aforesaid, that the jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under authority of the State.

Approved August 23, 1927.

ACT NO. 851, Georgia Laws of 1953, Pages 264 & 265: STATE JURISDICTION OVER CEDED TERRITORY.

Code § 15-302 Amended.

No. 851 (Senate Bill No. 265).

An Act to amend Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United States over certain lands in this State so as to provide that the State shall no longer retain its civil and criminal jurisdiction over persons and citizens of any ceded territory used by the Department of Defense; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia as follows:

Section 1. Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United States over certain lands in this State is amended by inserting after the word "State" at the end of the second sentence thereof the words "except as to any ceded territory owned by the United States and used by the Department of Defense but the State retains jurisdic-

tion over the regulation of public utility services in any ceded territory," so that said Section when so amended shall read as follows:

"15-302. Exclusive jurisdiction in and over any lands so acquired by the United States is hereby ceded to the United States for all purposes except service upon such lands of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. The State retains its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State, except as to any ceded territory owned by the United States and used by the Department of Defense, but the State retains jurisdiction over the regulation of public utility services in any ceded territory. Nothing herein shall interfere with the jurisdiction of the United States over any matter or subjects set out in the Acts of Congress donating money for the erection of public buildings for the transaction of its business in this State, or with any laws, rules, or regulations that Congress may adopt for the preservation and protection of its property and rights in said ceded territory, and the proper maintenance of good order therein."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 15, 1952.

APPENDIX "F"

RECENT NEWSPAPER ARTICLES AND AN EDITORIAL RELATING TO FLORIDA-ALABAMA MILK DISPUTE.

PENSACOLA NEWS - FRIDAY AFTERNOON JANUARY 18, 1963

'BAMA REPRISAL HINTED IN MILK FLOW DISPUTE

State Body Nixes Alabama Request for Rule Change

TALLAHASSEE (AP) — An Alabama authority warned today that reprisals might to taken against Florida agricultural goods unless a rule is changed that restricts the flow of Alabama milk into the Pensacola area.

James L. Lawson of the Alabama Agricultural Department delivered the warning to the Florida Milk Commission, which has ruled that Florida dairy farmers have preference in supplying the Pensacola area with top-priced milk.

The rule stipulates that Alabama producers can supply any milk demand not filled by the Florida men.

Lawson asked the Florida commission to halt enforcement of its rule pending negotiations. The Florida commission refused, but said it was will to negotiate with the Alabama authorities.

Lawson told the commission, "The situation unless changed might lead to borderline incidents on all our

agricultural products". He pointed out that Florida dairy farmers supply some of the milk sold in Dothan, Ala.

Lawson said that an agreement worked out in January 1957 between the two parties permitted the free flow of milk across the state until recently, when the commission voted in its new rule.

But Florida's Milk Commission chairman, Charles Andrews of Orlando, said no records of any such agreement existed in Florida.

Some 80 producers in south central Alabama ship their milk to Pensacola for packaging. Some of this milk is sold in Florida and the rest is shipped back to to the Alabama retail market. . . .

PENSACOLA JOURNAL - WEDNESDAY MORNING JANUARY 23, 1963. PAGE 9A.

THREE NAMED TO NEGOTIATE MILK SQUABBLE.

TALLAHASSEE (AP)—Two dairymen and a Florida Agriculture Department representative were appointed Tuesday to negotiate a milk dispute with Alabama before it spreads to other agricultural products.

Alabama's secretary of agriculture, A. W. Todd, called on Florida to relax an order that affects a group of South Alabama dairy farmers selling milk in the Pensacola market.

Three members of the Florida Milk Commission, which is enforcing the order, were named to negotiate with Alabama. They were Plant City distributor John Cone, Ocala dairy farmer Chris Jensen, and Alex Show of the Florida Agriculture Department.

The Commission disputed order says that Florida dairy farmers in the Pensacola area have priority on supplying the top-price milk to that market, with the Alabama producers allowed to supply the remaining demand. The Alabama producers have filed a lawsuit against the order in circuit court here and a hearing is set for Feb. 1.

PENSACOLA NEWS - MONDAY AFTERNOON, JANUARY 28, 1963, PAGE 4

(EDITORIAL)

ALABAMA-FLORIDA MILK 'WAR' SHOULD BE SETTLED QUICKLY

Florida Milk Commission's order requiring processors in the Pensacola area to purchase milk from Florida dairies first and from Alabama producers only when the local supply is insufficient has stirred up a controversy which can have major repercussions. Before it gets out of hand some settlement is needed, and quickly.

Alabama officials have threatened to place ruinous restrictions on other Florida products moving into and through that state unless the order is recinded. Also Alabama producers have filed suit in Tallahassee to get the bans withdrawn. Members of the Florida commission have been named to seek a negotiated agreement before the "boundary war" spreads to other fields.

But it will not be easy because of the problems inherent in milk production. The product cannot be stored indefinitely. Also the cows cannot be turned on and off to conform to changing demands. As a result some assurance of a ready market must be provided the Florida dairymen to encourage them to

maintain their herds. This is the objective behind the commission order giving top priority to local producers.

But this also places an artificial barrier on the products of nearby dairymen, on the other side of an imaginary line, who want to market their milk in the Pensacola area. These can argue, with reason, that their purchases in Florida are encouraged, not subjected to boundary restrictions. The trade should be a two-way street. It is difficult to dispute this position.

Court action may settle the question of the legality of the Florida barriers, but it cannot settle the larger problem of possible Alabama retaliation. A matter of geographical position has given our neighboring state a whiphand which cannot be ignored. Florida's product shipments to the great Mississippi Valley region must pass through Alabama or detour by a costly roundabout route through Georgia.

If it should determine to do so Alabama can install inspection regulations on all food shipments under the guise of health safeguards which could be ruinous. While it is doubtful that Alabama would go to such extremes it must be recognized as a possibility. So the protests cannot be ignored.

Some negotiated agreement, not a head-knocking showdown, is needed. It can be obtained if the conferees recognize all the factors involved.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 26 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 38

POLAR ICE CREAM AND CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY.

JOE J. HARRELL, ESQ.,
201 East Government Street,
Pensacola, Florida,

J. A. McCLAIN, JR., ESQ.,
Suite 615, Marine Bank Building,
Tampa, Florida,
Attorneys for Appellant.

HARRELL, CARO & WILTSHIRE,
Of Counsel.

INDEX.

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	3
QUESTIONS PRESENTED	4
STATEMENT	4
1. Proceedings Below	5
2. Opinion of the District Court	6
3. Background	7
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out Of State Milk Into Florida, In Violation Of The Commerce Clause Of The Federal Constitution	18
A. General Principles	18
B. The Actual Effect of Florida's Regulatory Scheme is to Reduce the Imports of Out-of-State Milk into Florida, to Enable the Florida Producers to Shift the Burden of Bearing their Fair Share of the Lower Surplus Milk Price onto the Out-of-State Sources of Supply, and to Save Florida Producers from all Effective Out-of-State Competition for Florida Distributor Outlets	21

INDEX—(Continued):

Page

ARGUMENT—(Continued)

C. The Florida Regulatory Scheme is Both Unnecessary for the Protection of any Legitimate State Interest and, Even if Necessary, is so Great a Burden on Interstate Commerce that it is Invalid Under the Commerce Clause 27

II. Florida Cannot Enforce Her Minimum Producer Price Regulations As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station, And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs Or Post Exchanges 32

THE MILITARY BASES:

1. Fort Benning, Georgia 34
2. Tyndall Air Force Base, Florida 35
3. Pensacola Naval Air Station 36
4. U. S. Navy Mine Defense Laboratory Panama City, Florida 36

III. Florida Cannot Enforce Her Distributors Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base And Pensacola Naval Air Station, Exclusive Jurisdiction To Each Having Been Ceded To The United States In Accordance With Article I, Section 8, Clause 17 Of The Constitution Of The United States 41

INDEX—(Continued):

	Page
CONCLUSION	45
PROOF OF SERVICE	46
APPENDIX A:	47
Constitution of the United States	47
APPENDIX B:	48
Federal Statutory Provisions	48
APPENDIX C:	50
Federal Regulations	50
APPENDIX D:	62
Florida Statutory Provisions and Milk Regulations	62
APPENDIX E:	85
Georgia Statutory Provisions	85

CITATIONS.

Cases:

Baldwin v. G. A. F. Seelig, 294 U.S. 511, 527 (1934)	7, 16, 19, 20, 27, 30
Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1950)	17, 29, 30
Florida Dairy, Inc. v. Florida Milk Commission, 149 So.2d 867	23
Florida Lime Growers v. Jacobson, 362 U.S. 73	2
Hood & Sons v. DuMond, 336 U.S. 525, 533-535 (1948)	16, 19, 20
International Business Mach. Corp. v. Vaughn, 98 So. 2nd 747	44

CITATIONS—(Continued):

Page

Cases—(Continued):
James v. Dravo Contracting Co., 302 U.S. 134 ..... 18, 37, 42
Lehigh Valley Coop. v. United States, 370 U.S. 76 (1962) 16, 23, 24, 25, 30, 31
Nebbia v. New York, 291 U.S. 502 (1933) 19
Nippert v. City of Richmond, 327 U.S. 417, 434 (1946) 31
Pacific Coast Dairy v. Dept. of Agri, 318 U.S. 285 ..... 2, 17, 32, 37, 38, 39
Parker v. Brown, 317 U.S. 314 (1942) 31
Paul v. United States ....U.S....., 9 L. Ed.2d 292, 83 S. Ct. 426 ..... 2, 17, 32, 33, 37, 39
Penn Dairies, Inc. v. Milk Control Com., 318 U.S. 261 39
Public Utilities Com. of Calif. v. United States, 355 U.S. 534 ..... 32, 40
Standard Oil Co. v. California, 291 U.S. 242 ..... 18, 43
Surplus Trading Co. v. Cook, 281 U.S. 647 ..... 18, 42
Texas Company v. Brown, 258 U.S. 466 7
United States v. City of Detroit, 355 U.S. 466, 469 41
United States v. Georgia Public Service Com., 9 L.Ed.2d 317 32
United States v. Paul, 190 F.Sup. 645 ..... 7, 32

Constitution and Federal Statutes:
Constitution of the United States:
Art. 1, Sec. 8:
Cl. 3 (Commerce Clause) ..3, 5, 6, 13, 17, 18, 21, 24, 27, 28, 29, 30, 31, 47
Cl. 17 ..... 3, 18, 35, 41, 47
Art. VI, Cl. 2 (Supremacy Clause) 2, 3, 5, 44, 47

CITATIONS—(Continued):

Page

Constitution and Federal Statutes—(Continued):
- Agricultural Marketing Agreement Act of 1937 ..... 23, 31
- Armed Services Procurement Regulation 3, 39
- Armed Services Procurement Regulation, Pt. 1, Para. 301 40

Federal Acts:
- 7 U. S. C. Sec. 608C(5)(C) 31
- 10 U. S. C. 2301-2314 3
- 10 U. S. C. Sec. 2304(a) 35, 37, 40
- 28 U. S. C. 1253 ..... 2, 15
- 28 U. S. C. 2281 ..... 2, 15

Florida Statutes:
- Stats. 1961 3
- Ch. 501 ..... 3, 6
- Ch. 501 Sec. 501.05(3) 14
- Ch. 501 Sec. 501.09 6
- Ch. 501 Sec. 501.09(3)(a) 14, 23
- Ch. 501.09(4)(b) 41
- Ch. 501 Sec. 501.20 10
- Florida Milk Commission Order Pen-2 12
- Florida Milk Commission Rule 220-1.05 Base Fixing Plan 3, 12
- Florida Milk Commission Rule 220-6.18 Milk Marketing Areas-Generally 3, 12
- Laws of Florida, 1845, ch. 25, Secs. 1 and 3 pp. 42, 43 & 44 ..... 3, 82

Other States Statutes:
- Georgia Law:
  - Georgia Laws, 1927, Act 373, pp. 352 and 353 85
  - Georgia Laws, 1952, Act 851, pp. 264 and 265 86

CITATIONS (Continued):

Page

Miscellaneous:

Barriers to the Interstate Movement of Milk, Univ. of Ariz., Ag. Exp. Sta., Bull. 255, April, 1954 26

Hutt, Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders, 37 U. Det. Law Rev. 565-567 25

Interregional Competition in Agriculture, Harvard University Press, Cambridge, Mass., 1951, Ronald L. Mighell and John D. Black, p. 314 27

Marketing Research Report N. 98, U. S. Dept. of Agriculture, 1955 26

Milk Movement Patterns in the Southeast, Carley & Purcell, Bull. 84, So. Coop. Series, April, 1962 21

Regulations Affecting the Movement and Merchandising of Milk, Ag. Mktg. Serv. 26

Reports of the Federal Milk Order Study Committee to the Secretary of Agriculture, October, 1954, April, 1962 26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 38.

POLAR ICE CREAM AND CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY.

OPINION BELOW.

The opinion of the District Court (R 181-189) is reported at 208 Fed.Supp. 899.

JURISDICTION.

The Opinion and Findings of Fact and Conclusions of Law and the Judgment (R 189) of the District Court were entered on July 26, 1962, and Notice of Appeal was filed by Appellant on September 21, 1962 (R 190). The Jurisdictional Statement was filed and the case was docketed on November 19, 1962. Motion to Affirm was filed by Appellees, and an Order extending the time in which to file Brief in Opposition to Motion to Affirm to and including February 22, 1963, was entered on January 29, 1963. The Brief for Polar Ice Cream & Creamery Company opposing Motion to Affirm was filed on February 21, 1963, and an Order noting probable jurisdiction was entered on March 18, 1963.

A civil action, required by 28 U.S.C. 2281 to be heard by a District Court of three judges, was brought by Polar Ice Cream & Creamery Company, and the Complaint raised the issue as to whether or not the Florida Milk regulatory scheme violated the Supremacy Clause of the Constitution of the United States, insofar as it related to the sale of milk on a military reservation exclusive jurisdiction to which had been ceded to the United States of America, and also whether the regulatory scheme was in violation of the Commerce Clause of the Constitution of the United States, and whether the regulatory scheme burdened the United States in the exercise of its procurement policy for the Armed Services. A direct appeal to this Court was taken under 28 U.S.C. 1253. *Paul vs. United States* .... U.S. ...., 9 L. Ed. 2d 292, 83 S. Ct. 426, *Florida Lime Growers v. Jacobson*, 362 U.S. 73, *Pacific Coast Dairy v. Dept.*, 318 U.S. 285.

STATUTES AND REGULATIONS INVOLVED.

UNITED STATES:

Constitution of the United States—Article I, Section 8, Clause 3; Article I, Section 8, Clause 17; Article VI, Clause 2;

10 U.S.C. 2301-2314; Armed Services Procurement Regulation.

FLORIDA:

Florida Milk Act, Chapter 501, Florida Statutes;

Florida Milk Commission Rule 220-1.05 Base Fixing Plan;

Florida Milk Commission Rule 220-6.18 Milk Marketing Areas—Generally;

Chapter 25, §1 and §3, Laws of Florida, 1845, Pages 42, 43, and 44; Florida Statutes, 1961, Page 3.

GEORGIA:

Act No. 373, Georgia Laws of 1927, Pages 352 and 353;

Act No. 851, Georgia Laws of 1953, Pages 264 and 265.

The pertinent provisions of the Constitution of the United States are set forth in Appendix "A", *infra*, Page 47.

The pertinent Federal statutory provisions are set forth in Appendix "B", *infra*, Pages 48 and 49.

The pertinent provisions of Armed Services Procurement Regulation are set forth in Appendix "C", *infra*, Pages 50 through 61.

The pertinent Florida statutory provisions and milk regulations are set forth in Appendix "D", *infra*, Pages 62 through 84.

The pertinent Georgia statutory provisions are set forth in Appendix "E", *infra*, Pages 85 through 88.

QUESTIONS PRESENTED.

One.

Whether Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out-Of-State Milk Into Florida In Violation Of The Commerce Clause Of The Federal Constitution.

Two.

Whether Florida Can Enforce Her Minimum Producer Price Regulations And Distributors' Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs And Post Exchanges.

STATEMENT.

This is a direct appeal by Polar Ice Cream & Creamery Company (hereinafter sometimes referred to as Polar) from the Judgment of a Three-Judge District Court convened in the Northern District of Florida, Tallahassee Division. Injunctive relief from the regulatory orders and minimum producer price regulations and distributors' privilege tax was sought by Polar Ice Cream & Creamery Company, and denied by the District Court.

Polar contended that the regulatory scheme and the tax imposed on milk sold by it as a distributor burdened

the flow of interstate commerce, in violation of the Commerce Clause of the Federal Constitution, and that the scheme, as applied to milk sold on military reservations exclusive jurisdiction to which had been ceded to the United States, violated the Supremacy Clause of the Federal Constitution. Polar also contended that such scheme was contrary to the Federal Procurement Policy, as applied to sales to the United States at the United States Navy Mine Defense Laboratory, exclusive jurisdiction to which had not been ceded to the United States, as well as to Fort Benning, Georgia, Tyndall Air Force Base (Panama City, Florida), and Pensacola Naval Air Station, exclusive jurisdiction to which had been ceded to the United States.

Polar Ice Cream & Creamery Company is a Florida corporation, with its plant and main place of business in Pensacola, Florida, sixteen miles from the Alabama border. (R 123.) Polar is in the business of purchasing raw milk and processing and selling it to military bases, consumers, and dealers. (R 123.) Its total annual sales average five million gallons. (R 142.)

1. Proceedings Below.

A complaint and an amended complaint were filed on behalf of Polar (R 1, 34). The appellees, in their Answer, (R 89), denied the allegations of the complaint that the Orders of the Florida Milk Commission issued in furtherance of its regulatory scheme, violated the Commerce Clause and the Supremacy Clause of the Federal Constitution. The lower court found that testi-

mony was taken and arguments heard with reference to the following issues:

(1) Whether Chapter 501, Florida Statutes, and the regulations and orders of defendant, as applied to milk delivered by plaintiff to military reservations, are constitutional.

(2) Whether provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, impose an undue burden upon interstate commerce, and are therefore unconstitutional.

(3) Whether the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, violate his constitutional rights of freedom of contract, due process, and equal protection of the law. (182.)

2. Opinion of the District Court.

The District Court refused to grant the injunction prayed for by Polar, and in response to the first issue as set forth above, found that the privilege tax of 15/100 of 1¢ per gallon levied pursuant to §501.09, Florida Statutes, was not a revenue raising device, but was in the nature of a regulatory fee based upon the privilege of doing business in the State of Florida and was not a tax upon milk. The Court further found that such tax did not impose an undue burden upon interstate commerce, and that the imposition of the fee upon Polar was proper, even though it delivered milk to United States military

installations. The Court cited *Texas Company v. Brown*, 258 U.S. 466, and *Baldwin v. Seelig*, 294 U.S. 511, in support of its conclusions. (R 183.)

The District Court found that the regulations and orders of the Florida Milk Commission did not violate the Federal Procurement Statute, and that the case of *United States v. Paul*, 190 F.Sup. 645, which was then pending in this Court, was not applicable, in that there was no showing of any restriction placed upon the price paid by the Federal government for milk purchased for military installations (R 183, 184).

The District Court found that the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the Florida Milk Commission did not place an undue burden upon interstate commerce, and that the base plan as set up by the Milk Commission regulations requiring Polar to purchase all the milk supplied by its Florida producers before purchasing out of state milk did not operate as a restraint of trade in interstate commerce (R 184). The Court further found the case of *Baldwin v. Seelig*, 294 U.S. 511, to be inapplicable (R 185), and found that the Milk Commission did not attempt to regulate the price which Polar pays its out of state producers, nor did the regulations restrict Polar from purchasing out of state milk in any amount or for any price. (R 186.)

3. Background.

Polar's sales to military installations are a significant part of its business. Exhibit "E" to the Complaint

(R 20) was a copy of the Invitation, Bid and Award of the contract to supply dairy products to Fort Benning, Georgia, in an estimated amount of $1,491,110.80. The contract was introduced into evidence (Pl. Ex. 1; R 124, 193). The bids were received and opened at the Purchasing and Contracting Office, Fort Benning, Georgia. The dairy products were also delivered to Fort Benning, Georgia. (R 120.) The contract for milk for troop issue in three or five gallon containers, in an estimated quantity of 1,180,000 gallons, was at a price of 58¢ per gallon (R 209). Polar also had a contract with Tyndall Air Force Base, Florida, the Invitation, Bid and Award being attached as Exhibit "I" to Polar's complaint (R 23). This contract was received in evidence as Plaintiff's Exhibit 2 (R 124, 243). This contract called for delivery of whole, fresh milk in five gallon dispenser cans at 60¢ per gallon (R 248).

The award of the contract which Polar had with United States Navy Mine Defense Laboratory was attached as Exhibit "H" to Polar's complaint (R 30) and provided for delivery of milk in five gallon cans at a unit price of 60¢ per gallon (R 31). Polar also had a contract with the Pensacola Naval Air Station for delivery of milk to the Officers' Club and the Navy Exchange (R 124).

Fort Benning, Georgia, Tyndall Air Force Base, Florida, and the Pensacola Naval Air Station, Pensacola, Florida, are all located on land exclusive jurisdiction to which has been ceded to the United States. (R 294-301; R 310-336.)

Polar has customarily purchased approximately 30% of its total supply of milk from Florida producers and the remaining 70% from producers in other states (R 132).

In the past, at certain times of the year, Polar's Florida producers have provided enough milk to equal the milk utilized by Polar in Florida as fluid milk, exclusive of special categories (equivalent to Class I) and at other times their deliveries have fallen short of this need. Consequently, at certain times of the year Polar has been obliged to use out of state milk to supply the Class I needs of its Florida customers. More frequently, it has been obliged of necessity to use out of state milk to satisfy its need for lower classifications of milk.[1]

Polar's customary arrangement with the Florida producers from whom it purchased milk was, prior to regulation by the Florida Milk Commission, to pay 61 cents

[1] A word about the classification of milk is in order at this point. Milk utilized by the consumer in fluid form (that is, generally, for drinking) commands a higher price than milk of identical quality which is used to make manufactured products of milk such as butter, cottage cheese, ice cream, etc. Accordingly, the processor or distributor of milk is able to pay the producer a higher price for milk which he, in turn, sells for utilization in fluid form. Therefore, most milk pricing systems require milk to be classified according to its use (Class I being, in general, fluid milk used by consumers) and a higher price to be paid for Class I than lower classes even though there is no difference in the quality of the milk. Problems of allocation which are involved in this case arise in the case of a distributor who sells milk both in fluid form and in manufactured form, and must thus pay for some milk at Class I prices and some at lower prices. Allocation is necessary to determine how much of the milk delivered by an individual producer is to be allocated to Class I (that is, treated as if it were sold in fluid form) and thus entitled to the Class I price and how much is to be allocated to lower classes.

per gallon for a fixed quantity of milk and $4.00 per hundred-weight (35.5 cents per gallon) for all milk beyond that quantity. (R 135.) Payment was not made according to the Class (which is to say, the utilization) of the milk (R 132, 135), and Polar was hence free to make a Class I utilization of milk purchased at the 35.5 cent price. The milk which Polar purchased in Alabama and elsewhere was purchased at prices on occasion as low as 30 cents per gallon. (R 127.)

On November 21, 1961, the milk producers in the four Florida counties which are westernmost in the state (Escambia, in which Pensacola is located, Santa Rosa, Okaloosa, and Walton) by vote placed that area, which is now termed by the Commission the Pensacola Milk Marketing Area, under the control of the Florida Milk Commission. By virtue of the terms of Section 501.20 of the Florida Statutes, neither the Alabama producers who regularly supply, through Alabama and Florida distributors, a large part of the year-round needs of the Pensacola area nor the Pensacola area distributors within and without the state of Florida, were permitted to take part in this vote.

Shortly after November 21, 1961, the Commission began to enforce against Polar a threefold scheme of regulation. This scheme was designed to guarantee to Pensacola, Florida producers, regardless of the play of economic forces, and regardless of competition from without the state, that they could sell *all* of their milk at a higher price than that paid to any other group of producers in the United States, even for the Class I portion of the latter's sales.

The first step in the fulfillment of the Commission's regulatory scheme was to fix the price for Class I milk at the level of 61 cents a gallon, the highest price in the nation (R 129, 152).

This was done by the simultaneous adoption of emergency (R 58) and permanent (R 64) price orders which were to be effective on January 18, 1962, and March 4, 1962 respectively. (At R 61 the order defining the classifications of milk in these orders appears.)

Having pegged the Class I price at the highest level in the United States, the Commission took the second step in its scheme, which was to ensure, through an allocation plan, that all of the milk delivered to distributors in the Pensacola area by Florida producers would be paid for at this Class I price, even though a substantial amount of milk sold by Polar was perforce utilized in lower class channels. The allocation plan was designed to make certain that the Florida producers would not be paid what amounted to a lower "blend" price (that is, a blend of the Class I and surplus price) and to that end provided that all of the Class I sales up to the amount of the Florida producers' deliveries would be allocated to them to the exclusion of the other suppliers of milk for the Pensacola area. Conversely, it provided that the Class II and other lower Class sales of which Florida producers were formerly absorbing a fair share, would be allocated to the out of state milk purchased by Polar and other distributors.

The allocation plan came into effect in an irregular manner. As is revealed by the Commission's order

Pen-2 (R 49), the Commission contemplated a system of allocation by which each of a distributor's producers would be assigned a "base", "earned base" or "base percentage," which would be a right to have his deliveries of milk paid for at Class I prices up to a certain percentage of the gallons of milk sold in Class I channels. For example, if a producer had a base of 2%, then all of the milk which he delivered to his distributor would be paid for at Class I prices as long as it did not exceed 2% of the milk sold by the distributor in Class I channels. Order Pen-2 purported to freeze these percentages, but the applicability of the order was uncertain in view of the fact that at the time of its adoption (January 25, 1962) there were no such formal percentages or bases in effect, the area having been free of Commission control for more than four years. (R 151.) Furthermore, there was not even any order explaining the extent of the rights which the holder of a base percentage would have, or what exactly a base percentage was.

Accordingly, in addition to order Pen-2 it was necessary to have an order establishing the base percentage system. Such an order was ultimately adopted by the Commission on October 25, 1962 (after the conclusion of this case in the trial court) as Rule 220-1.05 and, along with the allocation order, (Rule 220-6.18, Appendix D) which has a similar effect (paragraph 1 (g)), it is set forth in Appendix D to this brief so that the court may be informed and take judicial notice of it if it so desires.

However, before the adoption of the base and allocation orders, the Commission had achieved the same result by an ad hoc order applied solely to Polar. This order took the form of a letter to Polar's Florida producers with a copy directed to Polar. (R 48.) It asasigned percentages to Polar's Florida producers, totalling 100%, and gave this explanation of the method of calculating these percentages: "We have used your 'pounds of milk' base, that you had established with your plant [that is, Polar], and converted it into a 'base percentage'. This means that your base per cent remains the same for the year, and entitles you to that percentage of the Class I milk sales each month." Thus, the Commission had taken the number of pounds of milk that Polar had agreed to pay each Florida producer for at a fixed price, added them up, and determined what percentage each producer had of the total. The Commission had then declared that this percentage would be applied to the "Class I milk sales each month." The relationship of one Florida producer to another was preserved thereby but in the aggregate their rights were greatly increased for although they then delivered only 30% of Polar's supply, they were thereby given a right to 100% of Polar's Class I sales.

The intent of the whole regulatory scheme was laid bare by the Commission's lawyer in his argument to the Court. He referred (R 169) to "distress milk" coming from Wisconsin (as to the purchase of which there was no evidence in the record) and said that "if the distributor goes along and uses his base relationship or whatever it was with his producers, local producers,

until a distress situation existed in Wisconsin and then said, no, . . . [there is] just cause [for rejecting the producer's milk], we don't want your milk any more,"—the producer could not sell his milk elsewhere, and "by the time the distributor then would return for the wholesome supply of milk [in Florida] the producer economically would not be there to submit the milk to him." (See also R 146-148.) Although the statement rests upon faulty premises, that the intent of the regulatory scheme was to protect local producers from the competition from out of state imports seems clear enough. That the base order made no distinction between imports of distress milk, milk from regular out of state suppliers of the Pensacola market, or any other type of milk is clear. Of course, nothing in the record shows what, if any, percentage of Polar's milk was distress milk.

The third aspect of the Commission's scheme of regulation, was the enforcement of two Sections of the Florida Milk Control Law, Sections 501.05(3) and 501.09(3)(a), in order to forestall any attempt of Polar or other distributors to relieve themselves from the onerous regulation by reducing their purchases of milk from Florida producers. These sections, which are set forth at pp. 64 through 66 Appendix D, provided respectively that a distributor could neither terminate his relationship with his producers nor cut down the amount of milk received from them without showing just or reasonable cause, and, in the case of termination, receiving Commission approval. The attorney for the Commission admitted that a desire to purchase milk elsewhere would not constitute "reasonable" or "just" cause. (R 168, 169.)

Obviously, the enforcement of these statutes, in the manner they were interpreted, was a vital part of the Commission's plan to provide a captive market, at exorbitant prices, for the Florida producers, for without such enforcement the distributor would be free to escape the onerous regulations by moving some or all of his business to other states.

The Commission enforced these statutes against Polar even before its base fixing plan had come into effect, by demanding that it pay its producers an additional $18,556. (R 42-47.) See also the testimony of Mr. Fisher at R 144.

SUMMARY OF ARGUMENT.

The Court has jurisdiction of this direct appeal under 28 U.S.C. §1253. Direct appeal lies under that section from a suit required to be heard by a District Court of Three Judges convened under 28 U.S.C. §2281.

I. Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out Of State Milk Into Florida, In Violation Of The Commerce Clause Of The Federal Constitution.

A. General Principles.

The Commerce Clause of the Constitution of the United States favors open markets and a free flow of goods and services across State lines, and the disability of a State to isolate its own economy and pro-

tect its own inhabitants from competition is recognized. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, *Hood & Sons v. DuMond*, 336 U.S. 525.

B. The Actual Effect of Florida's Regulatory Scheme is to Reduce the Imports of Out of State Milk into Florida, to Enable the Florida Producers to Shift the Burden of Bearing their Fair Share of the Lower Surplus Milk Price onto the Out of State Sources of Supply, and to Save Florida Producers from All Effective Out of State Competition for Florida Distributor Outlets.

The Florida regulatory scheme requiring Polar to purchase all of the milk which its Florida producers deliver and pay a Class I price for such milk puts legal and economic pressures upon Polar to reduce its out of state purchases and acts as a barrier to the free flow of milk in a manner similar to the Federal Marketing Orders considered by this Court in *Lehigh Valley Coop. v. United States*, 370 U.S. 76.

The Pensacola Milk Marketing Area comprises a four-county area in the northwesternmost section of Florida, which is neither a natural milk shed, nor a natural marketing area, but is, instead, an artificial unit defined by boundaries which are economically arbitrary. The Pensacola area is a deficit area, and Polar buys only 30% of its milk there. Much of its other milk is obtained from nearby Alabama producers.

C. The Florida Regulatory Scheme is Both Unnecessary for the Protection of Any Legitimate State Interest

and, Even if Necessary, is so Great a Burden on Interstate Commerce that it is Invalid Under the Commerce Clause.

The Florida scheme is nothing more or less than "tariff" protection for Florida producers. The Florida regulations capture and hold open for the Florida producer as much of the prime portion of the Florida Market as he is willing and able to take.

Florida's scheme to block and burden imports demonstrates in a practical way a violation of the Commerce Clause. *Dean Milk Co. v. Madison*, 340 U.S. 349.

II. Florida Cannot Enforce Her Minimum Producer Price Regulations As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station, And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs Or Post Exchanges.

The Federal procurement policy, as enunciated in *Paul v. United States*, 9 L.Ed. 2d 292, forbids the enforcement of minimum producer price regulations as respects milk sold to the above military installations. The case of *Pacific Coast Dairy v. Dept. of Agriculture*, 318 U.S. 285, is authority for the inability of the State of Florida to enforce the minimum producer price regulations on military bases exclusive jurisdiction to which has been ceded to the United States. Federal procurement policy requires competitive bidding, as a

general rule, and a state regulatory scheme which would set minimum producer prices in conflict with such procurement policy is unenforceable. To regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

III. Florida Cannot Enforce Her Distributors Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base And Pensacola Naval Air Station, Exclusive Jurisdiction To Each Having Been Ceded To The United States In Accordance With Article I, Section 8, Clause 17 Of The Constitution Of The United States.

Florida is without jurisdiction to tax milk delivered to military reservations exclusive jurisdiction to which had been ceded to the United States. *Surplus Trading Company v. Cook*, 281 U.S. 647. *James v. Dravo Contracting Company*, 302 U.S. 134; *Standard Oil Company v. California*, 291 U.S. 242.

ARGUMENT.

I. Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out-Of-State Milk Into Florida, In Violation Of The Commerce Clause Of The Federal Constitution.

A. General Principles.

One of the fundamental policies of the Commerce Clause of the United States Constitution is the policy

in favor of open markets and a free flow of goods and services across state lines. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 527 (1934), *Hood & Sons v. Du Mond*, 336 U. S. 525, 533-535 (1948).

This principle has, of course, found specific application in the milk field in the cases just cited. Although this court has approved economic regulation of the milk industry that might not be warranted in other industries and under different conditions, *Nebbia v. New York*, 291 U. S. 502 (1933), it has not yielded to demands that the special nature of the problems that in the past prevailed in the milk field be held to justify an exception to the policy in favor of interstate competition and open markets. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511.

In the *Seelig* case, the court struck down provisions of the New York law which forbade the sale within the state of milk purchased outside the state at less than the New York producer price. Disposing of the state's suggestion that the prohibition was but an indirect burden upon commerce, the court said that such distinctions were irrelevant "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." The argument was of course made that the states needed power to control imports of milk in order to protect their farmers from the effect of competition which might drive them out of business and jeopardize New York's supply. Noting that the commerce clause was intended to end the

"mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation," the court observed that "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted" by the commerce clause. The court concluded, "peoples of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division."

The basic principles set forth in the *Seelig* case were affirmed in *Hood & Sons v. Du Mond*, 336 U. S. 525, (1948). This court there said:

> "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."
>
> . . . . . .
>
> "This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled."

The basis for the policies so applied was expressed in these terms by the court:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

B. The Actual Effect of Florida's Regulatory Scheme is to Reduce the Imports of Out-of-State Milk into Florida, to Enable the Florida Producers to Shift the Burden of Bearing their Fair Share of the Lower Surplus Milk Price onto the Out-of-State Sources of Supply, and to Save Florida Producers from All Effective Out-of-State Competition for Florida Distributor Outlets.

Florida is a net importer of milk and the Florida producers in the Pensacola area do not supply enough milk to satisfy the demands of the area. (R 154.) See Milk Movement Patterns in the Southeast, Carley & Purcell, Bull. 84, So. Coop. Series, April 1962. There is competition between Florida and out-of-state milk in the Pensacola market but imports of milk do not (contrary to the apparent situation in *Seelig* where the court nonetheless forbade restrictions on imports) necessarily displace the milk of local producers and deny to them a market for their product.

However, in spite of the fact that imported milk does not automatically displace local milk, in a relatively free market there could be competition in Pensacola in at least three ways: Florida producers might increase their production and compete to enlarge their share of the total market served by Florida distributors; they might simply compete to hold their share of the market at a given price; or they might retain their current share of the total market to obtain for all of their sales the high Class I price and thereby seek to force their competitors' sales into the lower price surplus category.

The Florida regulatory scheme, if valid, would absolve Florida producers from the need to participate in any of these three varieties of competition, because this scheme guarantees to Florida producers that their Florida distributors will have to purchase *all* the milk which these Florida producers deliver and will have to pay for it at premium Class I prices up to the total amount of the distributors' Class I sales.

Obviously, the concomitant effect of such a scheme is that, because of the tight economic structure of prices and thin distributor margins, out of state producers, many of whom regularly supply milk to make up the deficit in the Pensacola area, will *pro tanto* lose their Class I sales. (R 144-146.) Stated otherwise, the burden of receiving low surplus prices for a fair portion of the milk delivered is shifted from the Florida producers on to the out of state sources.

The natural tendency of the Florida producers will of course be to expand their total deliveries up to and beyond the level of Class I sales. Yet, they will still be fully protected from any sort of competition, or from any efforts of out-of-state sources even to preserve the share of the market which those sources formerly had.

Such a plan, of course, puts legal and economic pressure upon Polar to reduce its out-of-state purchases. First, the base plan obliges Polar to accept from Florida producers an amount of milk equal to Polar's Class I sales and Sections 501.05(3) and 501.09(3)(a) oblige Polar to accept milk even beyond this amount.[2] (The Commission apparently will not even consider a distributor's request to cut down producer receipts until those receipts exceed 115% of Class I sales. (R 144.)) These increased Florida receipts will inevitably necessitate an equivalent decrease in out-of-state purchases. Second, as the Florida producers gradually take over all of Polar's Class I sales, it will become advantageous for Polar to purchase its additional requirements in Florida at Class II prices rather than at out of state prices which might well be higher.

That the Florida scheme is a trade barrier and that it discriminates against out of state milk is clear from *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), where this court struck down a provision in a federal milk marketing order, issued under color of the Agri-

[2] Florida Dairy, Inc. v. Florida Milk Commission, 149 So. 2d 867.

cultural Marketing Agreement Act of 1937, having an effect identical to that of the Florida scheme. The close analogy between the policy of the Federal Act and that of the Commerce Clause and the fact that this court has found a federal plan, which is virtually identical in effect to the Florida scheme, to be a trade barrier, makes this holding a significant one for the case at bar.

In *Lehigh*, this Court considered a provision in a federal marketing order which required handlers of milk purchased from sources outside the marketing pool to make "compensatory payments" into the pool equal to the difference between the Class I and the Class III price. As this Court pointed out, "the sale for fluid use [Class I] of nonpool milk [out-of-area milk] in the marketing area displaced pool milk that might otherwise be used for this premium outlet." "A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers the blend price that they would receive if all outside milk were physically excluded and they alone would supply the fluid-milk [Class I] needs of the area." This resulted from the fact that compensatory payments into the pool completely made up for the loss to local producers of having their milk diverted from Class I into lower usages, an effect identical to that achieved by the Florida base plan.[3]

[3] A simple example will help to clarify this. Let it be assumed that a distributor has Class I sales of 100 gallons and Class II sales of 20 gallons. His Florida producers deliver one-half of his requirements of 120 gallons. The Florida plan would ensure that the Florida producers are paid at Class I prices for the 60 gallons which they deliver. If all of the

The *Lehigh* case has thrown in doubt provisions of federal orders which are virtually identical in effect to the Florida base plan in that they cause out-of-area milk to be allocated to lower classes and preserve the Class I market for pool producers. See Hutt, Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders, 37 U. Det. Law Rev. 565-567.

In regard to both of these plans for preserving the local Class I sales for local producers, however, it should be noted that they perforce have a *less* discriminatory effect than the Florida scheme. A glance at the map will confirm the fact that the four-county area to which Florida regulation applies is neither a natural milkshed nor a natural marketing area; but is instead an artificial unit defined by boundaries which are economically arbitrary. The Pensacola area is a deficit area and Polar buys only 30% of its milk there. Plainly, if a federal marketing area were in effect, it would encompass and, insofar as it had a protective effect, protect not only the Florida producers covered by the Florida scheme, but also many of the regular out-of-state producers who sell milk to Florida plants in Pensacola. The Florida producers would thus be denied preferential treatment over a number of out of

---

distributor's milk were brought in from pool producers under a federal order, however, the Florida producer would receive, but for the compensatory payments, the Class I price for 50 gallons and the Class II price for 10 gallons, actually in the form of a blend price. The *Lehigh* case thus leaves the producer with a blend price which is reduced by the fact that the imported milk occupies part of the Class I market. The Florida scheme, however, would avoid this result, and, by closing off the Class I market to outside milk, discourage its import.

state sources and these sources would be given equal treatment in the allocation of Class I sales. In spite of the interstate character of a federal marketing order which naturally limits its discriminatory effects, this Court has held that at least one device virtually identical in effect to the Florida scheme violates the expressed policy of Congress.

The foregoing indicates that the effect of pricing and allocation upon movement of milk is, because of the economics of the industry, certain to be considerable. See also Reports of the Federal Milk Order Study Committee to the Secretary of Agriculture, October 1954, April 1962. Barriers to the Interstate Movement of Milk, Univ. of Ariz. Ag. Exp. Sta., Bull. 255, April 1954. Regulations Affecting the Movement and Merchandising of Milk, Ag. Mktg. Serv., Mktg. Research Rept. N. 98, U. S. Dept. of Ag. 1955.

In summary, it seems clear that the Florida regulatory scheme will inevitably have a powerful and restrictive effect upon interstate commerce and will foster all the economic evils which flow from such restrictions. The Commission has attached economic consequences to an artificial state line which runs through a large interstate milkshed, and is supporting for the benefit of local producers, the highest producer price in the nation. It thus insulates the producers from all of the natural effects which competition would have upon this price. In the economic context of prices and competition that prevails, an increase in Polar's cost for Florida milk, caused by a discriminatory al-

location, inevitably decreases Polar's ability to pay for out of state milk, quite apart from the effect of the statutes which force Polar to purchase Florida milk. The Florida producer thus has his distributor blocked in all directions and holds him in the position of a true captive market.

The consequences of this interference with the natural flow of commerce are high Florida producer prices with high cost to consumers and consequent reduction in Florida consumption, loss of markets for the Alabama producers and consequent aggravation of the surplus problem, development of new, unneeded, uneconomic capacity in Florida under an artificial stimulus and consequent misallocation of resources,[4] and, of course, serious cuts in distributor profits.

C. The Florida Regulatory Scheme is Both Unnecessary for the Protection of Any Legitimate State Interest and, Even if Necessary, is so Great a Burden on Interstate Commerce that it is Invalid Under the Commerce Clause.

It has been clear since *Baldwin v. G. A. F. Seelig* that there are few if any local interests sufficiently

[4] "The close relationship between interregional competition and all agricultural price and production policy can now be appreciated. If prices are supported at too high a level, desirable adjustments between products and between regions will be retarded. The situation will be further aggravated by controls imposed to hold production in line. Any 'barrier' interposed in interregional competition for any purpose, however worthy, will also have the effect of 'protecting' the sheltered areas from the full play of economic forces and will prevent the full use of less costly resources." Interregional Competition in Agriculture, Harvard University Press, Cambridge, Mass., 1951, Ronald L. Mighell and John D. Black, p. 314.

great to justify a restriction having the practical effect of blocking the access of out of state goods to a market. In this case it is obvious that there is no purpose here but to foster the economic welfare of local producers and preserve them from competition. Such local interests do not justify an offense against the policies of the Commerce Clause.

What is complained of here is what was done after the Commission, by a vote of the Florida producers, took control of the Pensacola area in November of 1961. Before that time Polar was not obliged to allocate all of its Class I sales to its Florida producers without regard to the percentage of its total sales which they supplied. It is thus the allocation of an unfair proportion of Class I sales, which relieves Florida producers of receiving a slightly lower "blend" price instead of a Class I price, that is at the root of the discrimination in this case.

The state has seized for its producers the difference between the "blend" and the Class I price and is preserving it for them by means of the provisions which tie the distributors to the Florida producers. Insofar as out of state milk is bound to come in to fill the Pensacola deficit, Florida's action is a scheme for shifting a share of the distributors' payments from out of state to Florida milk. This is nothing more nor less than "tariff" protection for Florida producers. The Florida regulations thus capture and hold open for the Florida producer as much of the prime portion of the Florida market as he is willing and able to take. This

purpose, being inevitable, is presumptively intended, and Florida thus intends to give local producers the benefit of a milk tariff. There is no legitimate state objective behind such state interference with commerce, but even if such an objective could be asserted, it could surely be accomplished by less burdensome and discriminatory means and hence avoid the constitutional infirmities of the present scheme. *Dean Milk Co. v. Madison*, 340 U. S. 349, 354 (1950).

Although Florida's scheme to block and burden imports inevitably operates only upon a portion of such imports, reflecting the Commission's avoidance of methods superficially more clearly in violation of the Commerce Clause, this does not remove the constitutional infirmity. By the coincidence of state boundaries, Polar is in Florida and is regulated by the Florida Commission although it serves the same interstate market as Alabama distributors who also sell milk in Florida (R 127-128). Alabama milk and milk from other states can be and is thus sold in Florida not subject to the burden of unfair allocation placed upon Alabama milk imported through Florida distributors. Polar might thus compete, in the sale of Alabama milk, with an Alabama distributor just 16 miles away, but because of the existence of the state line, Polar would be obliged to allocate lower class sales to Alabama producers (causing discrimination between them and the producers of the Alabama distributor), or pay them high prices not in accord with the allocation system forced upon Polar by Florida (thus causing loss to Polar and a competitive disadvantage with the Ala-

bama distributor). If the Commerce Clause clearly requires Florida to leave the door open to Alabama imports through Alabama distributors, as it does, why should it permit Florida to close the door to Alabama imports through Florida distributors?

In view of the foregoing, there is no legitimate reason to preserve the state scheme and every reason to prefer the policies of the Commerce Clause over it.

The only difference between this case and the *Seelig* case is one of means to accomplish an end. In the economic context prevailing in the Pensacola area, it is perfectly clear that the practical effect of the Commission's regulations is to strike a severe blow to producers who supply, through Florida distributors, the milk which the Pensacola area must draw from outside the state. This is done to favor local producers. The effect was the same in *Seelig*, and the difference in means need not be of concern. As this Court has said in *Lehigh*, it is undesirable, even in areas regulated under federal marketing orders, for trade barriers to be set up "under the guise of price fixing regulation." It does not matter what form they may take. The practical effect upon commerce is the test for determining whether they are in violation of the Commerce Clause. *Dean Milk Co. v. Madison*, p. 354. It is likewise of no consequence that the discrimination against out of state goods does not appear on the face of the orders involved and operates also against Florida producers not affiliated with the distributor in question; see *Dean Milk Co. v. Madison*, footnote 4, p. 354. Again, it

is the practical effect that counts, for the Commerce Clause is concerned with the realities, not the theory, of a free flow of goods.

The dangers of protectionist regulations are particularly strong where, as here, the local producers make the decision as to whether the Commission will regulate and play a large part in its actions. It is indeed true that "provincial interests and local political power are at their maximum weight in bringing about acceptance" of a plan of this sort, *Nippert v. City of Richmond*, 327 U. S. 417, 434. The situation is analogous to a scheme under which the power to bring about a federal tariff might be delegated to the members of the industry desiring protection. The prohibition against state tariffs implicit in the Commerce Clause is doubly important to our national welfare where the state tariff is invoked by the vote of the special interests which it is designed to protect.

This sort of protectionism, as has been noted, is in conflict with the policies of the Commerce Clause. It has, moreover, in the specific form in question in this case, been held also to violate Congressional policy, as exemplified by the trade barrier clause of the Agricultural Marketing Agreement Act of 1937, U.S.C. § 608C(5)(G); *Lehigh Valley Coop. v. United States*. Thus, unlike *Parker v. Brown*, 317 U. S. 314, where it was successfully urged that the state regulatory

scheme was justified on the ground that it paralleled federal policy and was approved by the Secretary of Agriculture, Florida's exclusionary base plan is, in effect, identical to a scheme held to violate the Federal Act.

The Constitution and federal policy as declared by Congress thus unite in condemning a radical and discriminatory base plan of the sort which Florida has adopted, even without the added burden of a statute tying the distributor to his local producers. Florida's protectionist motive is clear, its restrictions on commerce are unrelated to any legitimate objective and there is hence no reason why such an obstruction to competition between the states should be allowed to continue.

II. Florida Cannot Enforce Her Minimum Prpducer Price Regulations As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station, And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs Or Post Exchanges.

The case of *Paul v. United States*, 9 L.Ed.2d 292, and *Pac. Coast Dairy v. Dept. of Agri.*, 318 U.S. 285, together with *Public Utilities Com. of Calif. v. United States*, 355 U.S. 534, and *United States v. Georgia Public*

Service Com., 9 L.Ed. 2d 317, are dispositive of this question.

In *Paul v. United States*, the question of whether the California regulatory scheme for the enforcement of minimum wholesale price regulations applied to milk sold to the United States and used for strictly military consumption at three Air Force bases over which the United States had exclusive jurisdiction was squarely considered. This Court held that as to milk used for strictly military consumption and for resale at Federal commissaries, the Federal procurement policy which required competitive bidding as the general rule prevailed over the California regulatory scheme which eliminated competition and defeated the command to Federal officers to procure supplies at the lowest cost to the United States.

As to milk purchased out of non-appropriated funds for use in military clubs and for resale at Post Exchanges, the time of the acquisition of the lands by the United States was determinative as to whether or not price control laws of California would be applicable.

Florida has a minimum producer price of 61¢ per gallon, and E. V. Fisher, Florida Milk Commission Administrator, at trial testified (R 147, 148) as follows:

> "Q. Now, Mr. Fisher, suppose the Polar Ice Cream Company should sell 100,000 gallons of milk under a bid to [fol. 210] a military installation, such as Eglin Field or Ft. Benning, Georgia, would

that milk be classified under your classification system as Class 1?

A. No, sir, that would be military milk.

Q. Excuse me, do you have any special classification except for Polar's producers for military milk? Today, I am talking about today, in the Pensacola milk marketing area?

A. If they used producer milk that would be Class 1, yes, at 61¢ a gallon.

Q. And you would require the Polar Company then to account to the producers for that milk sold to Ft. Benning camp just as Class 1 milk and you would take that percentage up to these people named and you would count that in your auditing computation?

A. It takes the Classification of Class 1 milk, it is for human consumption, and we would take that in if they used their producers milk.

[fol. 211] Q. It would be 61¢ a gallon?

A. Yes, and they know that when they use it.

Q. We all know it, don't we? We all know it?

A. You do."

Each of the four military installations in question will next be considered.

FORT BENNING, GEORGIA

The contract of Polar to furnish milk and dairy products to Ft. Benning, Georgia, (Pl. Ex. 1, R 124, 193) was the largest of the contracts, with an award being made on August 14, 1961, in an estimated amount of $1,491,110.80 (R 195). The Invitation for Bids provided

for sealed bids, which were to be opened at Ft. Benning, Georgia (R 194). The procurement authority was Title 10, U.S.C. §2304(a). (R 194). The unit price for milk delivered in three or five gallon containers was 58¢ per gallon (R 209).

Exclusive jurisdiction to Fort Benning, Georgia, reservation was ceded to the United States (Pl. Ex. 3, R 126, 295, 314, 316, 317).

TYNDALL AIR FORCE BASE, FLORIDA.

The Polar contract with Tyndall Air Force Base, Florida, was placed into evidence. (Pl. Ex. 2, R 124, 244.) This contract called for sealed bids; to be opened on the base, for the supplying of dairy products for troop issue (R 244), and provided, among other things, for Polar to furnish 98,000 gallons of fresh, whole milk at a unit price of 60¢ per gallon.

Exclusive jurisdiction was ceded to the United States, upon its application in writing, by Deed of Cession, dated January 7, 1943 (Pl. Ex. 3; R 126, 318-326). The Deed of Cession saved to the State of Florida concurrent jurisdiction for the service of process and saved to the United States security to its property and exempted the same from taxation under the laws of the State of Florida while the property was owned and occupied by the United States for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dockyards

and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States. (R 318, 334.) Acceptance of the Cession of Jurisdiction by the United States was by letter from Henry L. Stimson, Secretary of War, dated February 1, 1943. (R 297.)

PENSACOLA NAVAL AIR STATION.

The President of Polar testified that it had a contract for the delivery of milk to the Officers' Club and the Naval Exchange at the Pensacola Naval Air Station R 124). The United States has exclusive jurisdiction to the Pensacola Naval Air Station by virtue of deed of cession, dated October 13, 1856, from James E. Broome, Governor of the State of Florida, to the United States of America. (Pl.Ex. 3, R 126, 294, 312.)

U. S. NAVY MINE DEFENSE LABORATORY PANAMA CITY, FLORIDA.

Polar had a contract with U. S. Navy Mine Defense Laboratory (R 124, 272) for furnishing milk at a unit price of 60¢ per gallon.

The record is incomplete as to whether or not exclusive jurisdiction of this facility has been ceded to the United States, and whether or not the contract was for the furnishing of milk to be used for troop issue, but these matters could be resolved upon a remand to the District Court.

The rule laid down by this Court in *Pacific Coast Dairy v. Department of Agri.*, 318 U.S. 285, which was approved in *Paul v. United States*, 9 L.Ed.2d 292, squarely fits the factual situation of this case, insofar as milk delivered to Fort Benning, Georgia, is concerned. This enclave, is located without the State of Florida, and the activities of the United States, as respects the milk to be delivered there, all took place outside the territorial limits of the State of Florida, and on the military enclave to which the United States had been ceded exclusive jurisdiction. The contract was executed pursuant to the procurement authority found in 10 U.S.C. §2304(a). Sealed bids were received and opened at Fort Benning, Georgia, and the award was made in Georgia, and the dairy products which were the subject matter of the contract were delivered to Fort Benning, Georgia.

As to the Fort Benning contract, the State of Florida has no jurisdiction to impose the minimum producer price regulations against Polar. *James v. Dravo Contracting Co.*, 302 U.S. 134.

Tyndall Air Force Base, Florida, is also a military enclave, exclusive jurisdiction to which has been ceded to the United States, and cession of jurisdiction has been accepted by the United States. Polar's contract for the delivery of dairy products for troop issue to Tyndall Air Force Base was awarded after opening of sealed bids.

In the *Pacific Coast Dairy* case, this Court held that:

> "Contracts to sell and sales consummated within the enclave cannot be regulated by the California law."

(318 U.S. at 294.)

The Court also rejected the contention of California that the California Milk Act regulates only the conduct of California citizens within its own territory; that it is the purchasing, handling and processing by Pacific Coast Dairy in California of milk to be sold below the fixed price—not the sale on Moffett Field . . . which is prohibited, and entails the penalties prescribed by the statute. The Court found that the argument was without application because of the authority granted the Federal government over Moffett Field. 318 U.S. at 295.

The same rule would be now applicable to the argument that the State of Florida can regulate minimum producer prices, even though the sale of milk was on a military enclave exclusive jurisdiction to which had been ceded to the United States.

Polar's contract for delivery of milk to the Officers' Club and the Naval Exchange at the Pensacola Naval Air Station would be determined by the legislation in existence at the time exclusive jurisdiction to this area was ceded to the United States. The date of that deed of cession was October 13, 1855 (R 294, 312), which was

long prior to the passage of the first Florida Milk Act, which was in 1933.

This Court, in *Paul v. United States*, 9 L.Ed. 2d 292 said:

> "Since a state may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws."

It, therefore, follows, that because no Florida milk price control laws were in force at the time the United States acquired the land at the Pensacola Naval Air Station, sales made on that enclave would likewise be governed by *Pac. Coast Dairy v. Dept. of Agri.*, 318 U.S. 285.

This Court considered the Federal procurement policy and the pertinent provisions of the Armed Services Procurement Act, together with the Armed Services Procurement Regulation, in *Paul v. United States*, 9 L.Ed. 292, and in distinguishing the *Paul* case from *Penn Dairies, Inc. v. Milk Control Com.*, 318 U.S. 261, found that the command of the present regulation is that purchases for the Armed Services be made on a competitive basis, and that California's price fixing policy for milk was as opposed to this Federal procurement policy as was California's rate making policy in

Public Utilities Com. of Calif. v. United States, 355 U.S. 534.

It is recognized that a state may attempt to regulate the activities of the Federal government without verbally addressing its commands to a class, including the United States or its agents. It is the activities of the United States, and not its agents, that must be free from interference. Included among those activities is the Federal government's exercise of its power to contract. The Federal regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the government—price, quality and other factors considered." *Armed Services Procurement Regulation, Pt. 1, ¶301.*

Competitive bidding is the cornerstone of the policy, as exemplified by 10 U.S.C. 2304(a), which provides that purchases of and contracts for property or services shall be made by competitive bidding through formal advertising or by negotiation, but there is a clear mandate to use the method of procurement which will be most advantageous to the Government, price, quality and other factors considered. The fixing of minimum producer prices by the State of Florida would directly result in an interference with the procurement policy of the United States and would conflict with the procurement policy. Polar's contract for delivery of milk to Fort Benning provided that the same should be delivered at a unit price of 58¢ per gallon. Likewise, the contracts to deliver milk to Tyndall Air Force Base and to the U. S. Navy Mine Defense Laboratory were for

delivery at a unit price of 60¢ per gallon. It is thus apparent that the enforcement of a Florida regulatory scheme which would require Polar to pay a minimum price of 61¢ per gallon to its Florida producers would eliminate Polar and other Florida distributors who used Florida milk from bidding on similar contracts.

In determining whether an attempted State regulation of the terms of a contract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of the sellers of goods or services. In determining what is "direct", in defining the immunity, this Court goes beyond the bare face of the statute to consider all relevant circumstances. *United States v. City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

III. Florida Cannot Enforce Her Distributors Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base And Pensacola Naval Air Station, Exclusive Jurisdiction To Each Having Been Ceded To The United States In Accordance With Article I, Section 8, Clause 17 Of The Constitution Of The United States.

The pertinent portion of Chapter 501.09(4)(b), Florida Statutes, which relates to the tax on the distributors, is as follows:

"For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter".

The foregoing tax is in addition to any license fees or ad valorem taxes required to be paid by the distributor.

Fort Benning, Georgia, Tyndall Air Force Base, Florida, and the Pensacola Naval Air Station at Pensacola, Florida, are all military bases exclusive jurisdiction to which was acquired pursuant to the authority of Article I, §8, Clause 17 of the Constitution of the United States.

The case of *Surplus Trading Company v. Cook*, 281 U.S. 647, recognized the principle that as to land acquired for the purposes named in the foregoing constitutional provision, the Federal jurisdiction is exclusive of all State authority.

In *James v. Dravo Contracting Company, supra*, a suit was brought to enjoin the collection of a gross

receipts tax by a contractor with the United States for the construction of locks and dams in the Ohio River. The tax in question was in the nature of a privilege tax, equal to 2% of the gross income of the business, levied upon every person engaging within the State in the business of contracting. A portion of the contractor's work was performed at its plant in Pittsburgh. Some of the work was performed within the State of West Virginia on property exclusive jurisdiction to which had been ceded to the United States. This Court held that it was clear that West Virginia had no jurisdiction to lay a tax upon the contractor with respect to work done in Pennsylvania, and that as to work done within the exterior limits of West Virginia, the question was whether the United States had acquired exclusive jurisdiction over the respective sites.

> "Whenever the United States has such jurisdiction, the State would have no authority to lay the tax. Surplus Trading Co. v. Cook, supra."

302 U.S. at 140.

In the case of *Standard Oil Company v. California*, 291 U.S. 242, a California gallonage tax on gasoline delivered to a Post Exchange located within the Presidio of San Francisco, exclusive jurisdiction to which had been ceded to the United States, was struck down by this Court, and it was held that the State of California was without power to impose taxes in respect of sales and delivery made to such Post Exchange. The Court further said:

> "A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

The Supreme Court of the State of Florida, in *International Business Mach. Corp. v. Vaughn*, 98 So. 2nd 747, recognized the foregoing principles when an attempt to tax computing machines located at Eglin Field was challenged. The Court said:

> ". . . that the deed of cession vested in the United States exclusive jurisdiction * * * and that jurisdiction cannot be disturbed by tax gatherers because the right to tax was not reserved and the consent of the United States to tax was not given."

The District Court held (R 183) that the tax was in the nature of a regulatory fee and was not a tax on milk. It completely overlooked the application of the Supremacy Clause to the tax in question, but from the foregoing cases, it is clear that Florida was without jurisdiction to enforce the tax on the milk delivered to military reservations exclusive jurisdiction to which had been ceded to the United States

CONCLUSION.

For the foregoing reasons, the Judgment of the District Court should be reversed with directions to enter a Decree granting appropriate relief to the Appellant.

Respectfully submitted,

JOE J. HARRELL, ESQ.,
201 East Government Street,
Pensacola, Florida,

A. McCLAIN, JR., ESQ.,
Suite 615, Marine Bank Building,
Tampa, Florida,
Attorneys for Appellant.

PROOF OF SERVICE.

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of August, 1963, I served a copy of the foregoing Brief, together with Appendices, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, and MALLORY E. HORNE, of Horne & Rhodes, 102 1/2 South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.

JOE J. HARRELL,
Attorney for Polar Ice Cream &
Creamery Company,
201 East Government St.,
Pensacola, Florida.

APPENDIX "A"

CONSTITUTION OF THE UNITED STATES

The pertinent portions of the Constitution of the United States are as follows:

ARTICLE I, Section 8, [Clause 3]—To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

ARTICLE I, Section 8, [Clause 17]—To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

ARTICLE VI, [Clause 2]—This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX "B"

FEDERAL STATUTORY PROVISIONS

The pertinent Armed Services procurement provisions are 70A Stat. 127-133, as amended, 10 U.S.C. 2301-2314. Section 2304 provides:

2304. Purchases and contracts: formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

• • • • • • • •

(8) the purchase or contract is for property for authorized resale;

(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

• • • • • • • • •

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are un-

reasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

* * * * * * * * *

Section 2305 provides:

* * * * * * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * * * * * *

APPENDIX "C"

FEDERAL REGULATIONS

The Armed Services Procurement Regulations provide in pertinent part:

"1-301 **Methods of Procurement.** It shall be the objective to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered. Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent, in accordance with the policies and procedures set forth in this Regulation. Procurement shall be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, in accordance with the detailed requirements and procedures set forth in Section II; except that procurement may be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Section III. Procurement may also be effected, as provided in Sections IV and V, by such means as coordinated procurement or interdepartmental procurement.

. . . . . .

1-302.2 **Sources Outside the Government.** Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals ("bids" in the case of

procurement by formal advertising, "proposals" in the case of procurement by negotiation) shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the Military Department concerned, and thereby to obtain for the Government the most advantageous contract—price, quality, and other factors considered.

• • • • • • • • •

3-100 **Scope of Part.** This Part deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

3-101 **Negotiation As Distinguished From Formal Advertising.** Whenever supplies or services are to be procured by negotiation, price quotations (see ASPR Section XVI, Part 2), supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the contracting officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Section I, Part 3, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be

conducted, by contracting officers and their negotiators, with the attention being given to the following and any other appropriate factors:

(i) comparison of prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to production costs, including extra-pay shift, multi-shift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(ii) comparison of the business reputations, capabilities, and responsibilities of the respective persons or firms who submit quotations (see ASPR 1-903);

(iii) consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(iv) consideration of delivery requirements (see ASPR 1-306);

(v) discriminating use of price and cost analyses (see ASPR 16-206);

(vi) investigation of price aspects of any important subcontract;

(vii) individual bargaining, by mail or by conference;

(viii) consideration of cost sharing;

(ix) effective utilization in general of the most desirable type of contract and in particular of contract provisions relating to price redetermination (see Section III, Part 4);

(x) consideration of the size of the business concern (see ASPR 1-302.3 and 3-104);

(xi) consideration as to whether the prospective supplies is a planned producer under the industrial mobilization program;

(xii) consideration as to whether the prospective supplies requires expansion or conversion of plant facilities;

(xiii) consideration as to whether the prospective supplier is located in a surplus or scarce labor area (see ASPR 3-105);

(xiv) consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(xv) consideration of the extent of subcontracting;

(xvi) consideration of the existing and potential workload of the prospective supplier;

(xvii) consideration of broadening the industrial base by the development of additional suppliers;

(xviii) consideration of whether the contractor requires Government-furnished property, machine tools, or facilities; or Government-operated test facilities;

(xix) consideration of contract performance in facilities located in dispersed sites; and

(xx) advantages or disadvantages to the Government that might result from making multiple awards.

3-102 **General Requirements for Negotiations.** No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

(i) the contemplated procurement comes within one of the circumstances permitting negotiation enumerated in Section III, Part 2;

(ii) any necessary determinations and findings prescribed in Section III, Part 3, have been made;

(iii) such business clearance or approval as is prescribed by applicable Department procedures has been obtained; and

(iv) the prospective contractor has been determined to be responsible in accordance with ASPR Section I, Part 9.

* * * * * * * *

Procurement by Negotiation

Part 8- Price Negotiation Policies and Techniques

* * * * * * * * *

3-801.1 General. It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Govenment. Sound pricing depends primarily upon the exercise of sound judgment by all personnel concerned with the procurement.

* * * * * * * * *

Army Procurement Procedure 3-101 provides:

3-101 Negotiation as Distinguished from Formal Advertising.

a. **Competition.** The fact that a procurement is to be negotiated does not relax the requirements for competition. When supplies or services are to be procured by negotiation and when consistent with the accomplishment of procurement objectives, quotations or proposals shall be solicited from all such qualified sources of (as defined in ASPR and APP 1-201.9) supplies or services as are deemed necessary to insure effective competition and to insure that the procurement is made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Part 3, Section I, ASPR

and APP. Competition is not necessary in contracting for personal or professional services.

b. **Conduct of Negotiations.** Procurement by negotiation is less automatic than, and does not have the rigid limitations of, formal advertising bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform.

. . . . . .

(2) Negotiation will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed.

(3) During the negotiation of contracts, simultaneous coordination, to the greatest practical extent, shall take place among the contracting, technical, price analysis, legal, and industrial planning personnel. Instructions to be followed by negotiating teams will be prepared with full coordination of traffic management consultants in purchasing offices, and such teams will be directed to seek traffic management advice upon the appearance of new traffic elements (such as change in shipping points, specifications, etc.) in the negotiations.

* * * * * * * * *

c. **Requests for Proposals.**

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, contracting officers shall use DD Form 747 (Request for Quotations) or a DD Form 746 (Request for Proposals and Proposal). See ASPR 16-201 and 16-203.

* * * * * * * * *

Air Force Procurement Regulation, Paragraphs 2-000, 2-101, 2-102 provide:

2-000 Scope of Section. In recognition of the fact that formal advertising is the basic method of procurement by the Government, this Section gives detailed guidance to AF procurement per-

sonnel for adapting formal advertising procedures to use in fulfilling as many procurement requirements as possible. In particular, Part 20 sets forth many examples of special provisions which may be incorporated in Invitations for Bids to assure that the Government's requirements will be fully met and at the same time preserve the benefits of full and free competition which are inherent in formal advertising.

PART 1—USE OF FORMAL ADVERTISING

2-101 Meaning of Formal Advertising. Formal advertising involves three basic steps. First, the preparation of an Invitation for Bids, in the prescribed form, describing the requirement of the Government accurately and completely, but avoiding any limitations which have no reasonable relationship to the actual needs of the Government and which might tend to limit the number of bidders (see AFPI 2-201). Second, publicizing the Invitation for Bids through posting in public places, distributing to prospective bidders, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and submit formal bids before the time slated for public opening of bids (see AFPI 2-202). Third, awarding the contract, on the basis of the bids publicly opened, to that responsive responsible bidder whose bid is most advantageous to the Government, price and other factors considered. (See Part 4 of this Section.)

2-102 USE FOR FORMAL ADVERTISING

(a) **Statutory Requirement.** 10 U.S.C. 2304 (a) provides that all contracts for supplies or services, with certain stated exceptions, will be made by formal advertising. (See ASPR and AFPI Section III, part 2 for discussion of the exceptions.)

(b) **House of Representatives Report.** The House Committee on Armed Services, section 2(e) of House Report No. 1688 (84th Congress, 2nd Session, January 1956) accompanying H.R. 8710, has stated as follows:

The amendment adds a new subsection. In it, we have stated positively the intention of Congress that all procurement shall be by advertised bidding. We have said, in clear language, that none of the exceptions 2(c) (1) through (17) shall be used by the agency head unless the facts and circumstances in justification thereof are clear and convincing.

We mean by this that "borderline" cases or "Grey areas," as they are sometimes referred to, and any case in doubt or uncertainty shall be resolved in favor of advertised competitive bidding and not by resorting to these 17 exceptions.

The Comptroller General, in his vigilant examination of the operation of this Act and of procurement practices generally, will, as the agent of Congress, be fully advised and fortified by this firm expression of congressional intent. And moreover, no agency head can now be in any doubt

whatsoever as to what Congress expects of him. We cannot be more explicit.

We propose that the trend shall be toward advertised competitive procurement and that advertised competitive procurement will be the rule, that in every case in which the agency head or his subordinates look toward the exceptions of the Act, they are met with the expression of congressional intent in this act, as amended, that what they do must be supported by a justification which is both clear and convincing. And the Congress will examine the findings that are required under the act, from time to time, to determine whether this mandate is being followed. We are determined that the trend which prompted this inquiry, shall be reversed.

(c) **Air Force Policy.**

(1) The AF policy is to use formal advertising procedures whenever possible notwithstanding the existence of a negotiation authority under 10 U.S.C. 2304(a) and ASPR and AFPI Section III. Part 2. Thus negotiation authority will be used only when the facts and circumstances of the procurement clearly indicate the need to use the authority. For example, 10 U.S.C. 2304(a)(9) authorizes the procurement of perishable subsistence supplies by negotiation. Milk is perishable subsistence as defined in AFR 145-11 and Rulings and Interpretations of the Walsh-Healy Public Contracts Act, but troop issue requirements are adequately covered by specifications and competition is generally available, accordingly,

such procurements of milk should be advertised when volume quantities are involved.

(2) Before the negotiation authority of ASPR 3-202 or 3-210 is used, officials approving determinations and findings (see AFPI 3-306(b) will satisfy themselves that formal advertising procedures cannot be used without detriment to the Government, and that the facts and circumstances in justification of negotiation are clear and convincing.

• • • • • • • • • •

APPENDIX "D"

PERTINENT FLORIDA STATUTORY PROVISIONS AND LEGISLATIVE HISTORY

A. The entire Florida Milk Commission Act, Chapter 501, Florida Statutes, 1961, at Page 2220, is set forth in the Appendix to the Jurisdictional Statement. Some of the pertinent parts of the Act are as follows:

[2222] **501.04 Powers of milk commission.**—The milk commission is declared to be an instrumentality of the state for the purpose of attaining the ends recited in the legislative findings, and may:

(1) Supervise and regulate the entire milk industry of the state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk, cream and milk products, *in any market established by the commission in the state;* provided, however, that nothing contained in this chapter shall be construed to abrogate or affect the status, force or operation of any provision of any law relating to public health or sanitation, the purity of food or food products, (the public health law, the public service law, the state sanitary code), milk products law, except as provided for in §501.09(4), state ice cream law, or any local health ordinance or regulation; and provided, further, that nothing in this chapter shall give the commission power to make rules or regulations prohibiting the giving away gratis of milk or milk products in cases of charity.

(2) Investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state.

* * * * * * * *

[2223] (9) Make, adopt and enforce all rules, regulations and orders necessary to carry out the purpose of this chapter; hold hearings after reasonable notice thereof has been given; receive sworn testimony and evidence at hearings as to the reasonableness of any order, rule or regulation of the commission; *reasonably classify and establish definite market areas,* and provide different rules, regulations and charges therefor; establish health and sanitary requirements. The commission after public hearing and investigation may fix the prices to be paid producers by distributors, milk dealers or producer-distributors in any market or markets; may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk; may establish the grades of milk; may establish reasonable rules and regulations for fair competition, and fix reasonable rules and regulations for the conduct of the commission's business and for the regulation of its employees; may require reasonable examinations of license applicants to test their general fitness to engage in any business defined in this chapter; may establish rules and regulations for hearings in keeping with the procedure herein authorized; may revoke, suspend or refuse to issue the license of any person hereunder for the violation of any rule,

regulation or order of the commission, after due notice and a fair hearing as herein provided; may provide for the collection of license fees authorized by this chapter, and may regulate all matters reasonably incidental to the general or specific powers herein recited; may provide for deputy administrators in any market area created by the commission, with such authority as may be designated by the commission, including the power to investigate complaints, report violations of the commission's orders, and to have such other powers reasonable or incidental thereto, including the right to administer oaths, make investigations, conduct hearings when ordered by the commission, and on due notice to take testimony in connection with investigations of complaints, and to cause the same to be stenographically transcribed and reported and transmitted to the commission for final action thereon, together with such other authority as the commission may designate in keeping with the general powers and purposes created under this chapter.

* * * * * * * *

501.05 Rules and orders of milk commission.—

* * * * * * * *

[2224] (3) The relationship between a producer and a distributor, under which milk produced by the producer is regularly delivered to and accepted by the distributor, when once established, shall not be terminated either by the producer or by the distributor

without just cause therefor, and the approval of the commission. Just cause will be considered by the commission as any cause deemed just by a prudent and reasonable man.

Arbitrary, capricious and vindictive reasons will not be considered as just cause for any such termination.

(4) The commission shall set a standard date as the date from which not less than ninety days written notice in writing and in advance must be given by the producer or the distributor involved to the other before any such theretofore established relationship may be terminated; unless such notice is given, such relationship will not be terminated, even though just cause exists for termination, unless just cause exists excusing the failure to give such notice.

* * * * * * * *

[2225] **501.09 Issuance, revocation, etc., of licenses to milk dealers.—**

* * * * * * * * *

(3) (a) That a milk dealer has rejected, without reasonable cause, any milk delivered to and accepted by the milk dealer from a producer delivered by or on behalf of the producer in ordinary continuance of a previous course of dealing, or that a milk dealer has rejected without reasonable cause, or has rejected without reasonable advance notice, any milk

tendered or offered for delivery to the milk dealer by or on behalf of a producer in ordinary continuance of a previous course of dealing. It is intended hereby to provide and require that a milk dealer shall not reject or refuse to accept any milk tendered or offered for delivery by or on behalf of a producer in ordinary continuance of a previous course of dealing unless there exists reasonable cause for the rejection or refusal to accept such milk and unless the milk dealer has also given such advance notice as may be reasonable under the circumstances of intention to reject or refuse to accept such milk.

[2226] On or before the tenth day of each month each distributor shall make a report under oath to the commission upon such form and containing such information as the commission shall prescribe; but each report shall specifically, and in addition to all other information which may be required by the commission, contain and set forth:

(a) The number of gallons of milk produced; the number of gallons of milk received; and the number of gallons of milk distributed by such distributor during the preceding calendar month; and

(b) The name and address of each producer or any other person from whom the distributor purchased milk for distribution during the preceding calendar month and the quantity of [2227] milk purchased from each producer or other person, and the price per gallon paid to each producer or other person for milk so

purchased, and the number of gallons purchased by such distributor if such distributor be also a producer.

For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter.

* * * * * * * *

Any person subject to the provisions of this chapter failing or refusing to furnish any return required to be made or failing or refusing to furnish a supplemental return or other data required by the commission or who shall violate any of the provisions of this chapter, including failure to secure a license or who shall violate any valid rule or regulation of the commission, or who shall secure a license upon false or fraudulent application, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding six months and each offense and each day of violation shall constitute a separate offense.

* * * * * * * *

[2228] (6) For the privilege of continuing in or engaging in the business of producing milk, or acting as a dairy farmer under the provisions of this law, there is hereby imposed upon every dairy farmer a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of class I milk produced, as defined by the commission, by each such dairy farmer, and delivered to the platform of the distributor or producer-distributor during each calendar month. The amount of such tax shall be deducted by the distributor and the producer-distributor from the moneys due to the dairy farmer, and by such distributor or producer-distributor remitted to the commission at the time that the monthly reports are required to be filed by the distributors or producer-distributors with the commission, as provided by this chapter, and in the event the dairy farmer acts as his own distributor he shall remit the said tax to the commission at the time that the monthly reports are required to be filed by the distributor and producer-distributor with the commission, as provided by this chapter.

. . . . . .

[2229] **501.13 Order by commission fixing price of milk.—**

. . . . . .

[2230] (4) The commission after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the prices to be paid by milk dealers to producers

and others for milk and its various grades and uses. The order of the commission with respect to the prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold, and may vary in different localities or markets according to varying uses and different conditions. Each order may classify milk by forms, classes, grades or uses as the commission may deem advisable and may specify the price therefor. A violation of this subdivision shall render such persons offending this chapter specifically subject to the provisions of §501.08.

(5) After the commission has fixed prices to be charged or paid for milk whether by class, grade or use, it is unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price or prices as shall be applicable to the particular transaction, whether by any discount, or rebate or free service, or advertising allowance or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

* * * * * * * *

[2231] (8) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful.

* * * * * * * *

501.20 Exercise and withdrawal of exercise of supervisory and regulatory powers in markets.—

(1) The commission shall not supervise and regulate any market in the state which it does not now supervise and regulate, or from which the exercise of its supervisory and regulatory powers is hereafter withdrawn unless there is presented to it a written petition signed by not [2232] less than ten per cent in number of the producers and producer-distributors in such market, and representing not less than fifty per cent of the distributors buying milk from the base earned producers in such market, requesting it to exercise its supervisory and regulatory powers therein and unless, in a secret ballot election, to be called by the

commission as promptly as reasonably possible after the presentation to it of such petition, a majority in number of the producers and producer-distributors eligible to vote in such election vote in favor of the exercise by the commission of its supervisor and regulatory powers in such market. If in the election such majority in number vote in favor thereof, the commission shall supervise and regulate such market, but otherwise shall not do so.

(2) Whenever there is presented to the commission a written petition signed by not less than ten per cent in number of the producers and producer-distributors in any market in the state over which the commission is exercising its supervisory and regulatory powers, pursuant to this chapter, requesting the commission to withdraw the exercise of such powers from such market, there shall be called by the commission, as promptly as reasonably possible after the presentation to it of such petition, a secret ballot election among the producers and the producer-distributors in that market. In the event, in such election, a majority in number of the producers and producer-distributors eligible to vote in such election vote in favor of the withdrawal therefrom by the commission of the exercise of its supervisory and regulatory powers, the commission shall withdraw the exercise of such powers by it from such market, but otherwise shall not do so.

(3) The commission shall prescribe the procedure to be followed in calling, holding, conducting and ascertaining the results of the elections provided for herein

and may adopt reasonable rules, regulations and orders in regard thereto, but it shall insure that any election held hereunder is held by secret ballot, and that all those entitled to vote therein are given reasonable notice of the time and place of such election and reasonable opportunity to vote therein, provided, however, that the commission shall appoint a person or firm not a producer, producer-distributor or distributor or the commission or any member or employee thereof to conduct any such election called under the provisions of this section. Expenses of calling, holding, conducting and ascertaining the results of any such election shall be paid by the commission. The person or firm so appointed shall certify the results of the election to the commission promptly after such election is held.

The commission may schedule one election at one time and one place but in no event shall an election be held less than six months following an election; if, because of the size of the market involved, or for other reasons, the commission deems it advisable so to do for the convenience of those entitled to vote in such election, it may hold such election at more than one place within such market, and may designate different times and places within such market at which voting may be done. However, none of the votes shall be canvassed, nor shall any information concerning them be given or disseminated to anyone by the person or firm appointed to conduct the election, until all times fixed for holding such election have elapsed. In the event that any election is conducted at more than one location only one ballot box shall be used by the person or firm appointed by the commission.

(4) Determinations respecting numbers of producers and producer-distributors in any market shall all be made by the commission as of the end of the second calendar month preceding the month in which an election hereunder is called. All persons who were producers or producer-distributors in such market at the end of such second preceding calendar month shall be entitled to sign any such petition, and to vote in any election called hereunder, and shall be counted, regardless whether at the time of signing any such petition, or of its presentation, or of any election held hereunder, they are producers or producer-distributors in the market. Any who were not at the end of such second preceding calendar month producers or producer-distributors in the market shall not be counted in number, in determining the results of any election held hereunder, and shall be eligible neither to sign any such petition nor to vote in any such election, even though they may become producers or producer-distributors in such market after the end of such second preceding calendar month.

The number of producers and producer-distributors voting in the election shall be determined by the commission. In making such determination, the commission may obtain information from all available sources, including but not limited to, its own records and reports, the books and records of producers in the market, and the books and records of producer-distributors and distributors in the market, whether such books and records are kept, or are available, within or with-

out the geographical limits of the market. It shall make all such determinations as promptly as reasonably possible and with as much accuracy as is reasonably possible in order to make such determinations without undue delay, and its decisions in regard thereto shall be final.

(5) Whenever, under this section, the commission shall commence exercising, or withdraw the exercise of, its supervisory and regulatory powers in any market, it shall do so by order, and the time when such commencement or such withdrawal shall be effective shall be the date when the results of any election conducted under the provisions of this section are filed with the commission by the person or firm authorized to conduct such election.

* * * * * * * *

[2233] **501.23 Penalty for violations.**—A violation of any provision of this chapter or of any rule or order of the commission lawfully made, except as otherwise expressly provided by this chaper, shall be a misdemeanor punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, and each day during which such violation shall continue shall be deemed a separate violation.

* * * * * * * *

MILK MARKETING AREAS—GENERALLY

IN THE MATTER OF ALLOCATING RECEIPTS OF A DISTRIBUTOR OR PRODUCER-DISTRIBUTOR TO CLASSIFICATIONS OF UTILIZATION AS TO SOURCE OF MILK; APPLICABLE TO ALL MILK MARKETING AREAS.

220-6.18 WHEREAS, the Florida Milk Commission, upon request from the industry and after investigation and through discussion, has now found and determined that a method for allocating various sources of milk receipts of a distributor or producer-distributor should be outlined to establish fair and uniform methods of allocating the utilization of milk within a plant.

NOW THEREFORE,

IT IS HEREBY ORDERED that:

(1) All receipts of a distributor or producer-distributor shall be allocated to utilization in the following manner:

(a) The base percentage earned by each producer shall be applied to the total number of gallons of milk utilized in Class I channels by each distributor and producer-distributor to determine the number of gallons of milk for which the producer must be paid at the Class I price fixed by the Commission.

In the event a producer fails to produce the amount of milk that his "earned base" entitles him to, in Class

I channels, such deficit must be reallocated to the other "earned base" producers in proportion to their "earned bases", and the Class I price paid for the milk so reallocated.

(b) The method outlined above for computing allocations to Class I utilization shall be followed in computing allocations for all other classes.

(c) First allocation of a producer's deliveries shall be to Class I utilization, with allocation continued thereafter in descending order of price through Class IV classification.

(d) In computing Class I sales to be allocated to producers, no adjustment shall be made for milk received by distributors and/or producer-distributors from sources other than "earned base" producers.

(e) In computing milk utilization to be allocated to producers, milk transferred or diverted shall be classified and allocated according to its final utilization.

(f) Milk imported for military sales in accordance with other orders and not utilized in military sales during the calendar month it is imported, shall be considered as other source milk for allocation, unless separate records and a complete physical separation of military milk is maintained at all times, with no borrowing or co-mingling between military milk and other plant milk.

(g) Other source milk shall be classified and allocated in the following order after base earned producer's milk has been allocated and in the same descending order of classification, I through IV:

FIRST: Milk from regular suppliers not having a base.

SECOND: Milk from distributors or producer-distributors within the area.

THIRD: Milk from distributors or producer-distributors from other Florida Milk Commission controlled areas.

FOURTH: Milk from other areas in Florida.

FIFTH: All other milk and milk products.

Exception to the above order of allocation: Any whole fluid milk that is dumped in accordance with prior notification as required by the Commission, shall be allocated to Class IV.

This order constitutes a reasonable regulation of the milk industry of the State of Florida in the several markets of the state supervised and regulated by the Commission, is necessary to carry out the purposes of Chapter 501, Florida Statutes, and is the regulation of a matter reasonably incidental to the general or specific powers given to the Commission by Chapter 501, Florida Statutes; and the Florida Milk Commission derives authority for the adoption of the order hereinabove recited from Chapter 501, Florida Statutes generally, and from Chapter 501.04, Florida Statutes, specifically.

DONE and ORDERED by the Florida Milk Commission at Sarasota, Florida, this 24th day of August, 1962.

[3] 220-1.05 Base fixing plan.—

(1) SCOPE: The base fixing plan in this section applies to the Pensacola Milk Marketing Area in Florida under the supervision or regulation of the Florida Milk Commission.

(2) DEFINITIONS: As used in this section and for its purposes, the following words have the meaning indicated:

(a) Producer—means any person, firm, partnership, corporation or association producing milk within the State of Florida, including, but not limited to, an association organized or incorporated under Chapter 618, Florida Statutes, producing milk, or whose members are producing milk, within the State of Florida.

(b) Distributor—means a distributor who operates a milk gathering station or processing plant where milk is collected and bottled or otherwise processed and prepared for sale within milk marketing areas of the State of Florida affected by this section.

(c) Producer-Distributor—A distributor who is also a producer producing at least seventy-five per cent (75%) of the milk he processes and prepares for sale.

(3) BASE FIXING PERIOD FOR AREA. The base fixing period for the Pensacola Milk Marketing area is as follows: Beginning September 1 and ending November 30, both dates inclusive, of each ensuing year.

(4) ESTABLISHING BASE; EFFECT.

(a) During the base fixing period, each producer shall establish with his distributor or producer-distributor a base, and each distributor or producer-distributor shall establish for each producer a base. A producer-distributor who has other producers shall establish a base with his own plant in exactly the same manner as the other producers establish their bases.

(b) Said base or bases shall be construed as a binding contract between producers and their distributors or producer-distributors, and said base or contract shall remain in full force and effect from the first day of the second month following the end of the base fixing period until the first day of the second month following the end of the next ensuing base fixing period, unless terminated in accordance with the provisions of Chapter 501, Florida Statutes.

(5) RECORDS OF DELIVERIES. During the base fixing period, each distributor and producer-distributor shall cause to be kept a complete record of all milk delivered by each producer.

(6) BASE PERCENTAGE; COMPUTATION AND APPLICATION.

(a) During the base fixing period, a base percentage shall be determined for each producer by calculating the ratio of the milk delivered by each producer to the total milk delivered by all producers for the entire base fixing period, which percentage is referred to herein as "earned base". This computation shall be

made immediately following the close of the base fixing period, and within thirty (30) days thereafter, each producer shall be notified by mail of his base percentage and the base percentage of all other producers participating in that particular base. During this period, each plant shall supply the local Deputy Administrator with a summary of its base computations. The producer notification must illustrate how the base percentage for the producer concerned has been determined.

1. The base percentage earned by each producer shall be applied to the total number of gallons of milk utilized in Class I channels by each distributor and producer-distributor to determine the number of gallons of milk for which the producer must be paid at the Class I price fixed by the Commission. In case a producer fails to produce the amount of milk that his "earned base" entitles him to, in Class I channels, such deficit must be reallocated to the other "earned base" producers in proportion to their "earned bases", and the Class I price paid for the milk so reallocated.

[4] 2. The method outlined above for computing allocations to Class I utilization shall be followed in computing allocations for all other classes.

3. First allocation of a producer's deliveries shall be to Class I utilization, with allocation continued thereafter in descending order of price through Class IV classification. The balance of any producer's produc-

tion after the above allocations may then be placed in the lowest price classification.

4. In computing Class I sales to be allocated to producers, no adjustment shall be made for milk received by distributors and/or producer-distributors from sources other than "earned base" producers.

5. In computing milk utilization to be allocated to producers, milk transferred or diverted shall be classified and allocated according to its final utilization.

(7) EXISTING BASES TO REMAIN IN EFFECT. Unless terminated in accordance with the provisions of Chapter 501, Florida Statutes, all existing bases and relationships between producers and distributors and/or producer-distributors shall remain in full force and effect until the first day of the second month following the end of the first base fixing period provided in subsection (3).

(8) EARNED BASES TRANSFERABLE. A producer's "earned base" may be transferred, provided the prior approval of this Commission is obtained. The transferor and the transferee shall make declaration to the Florida Milk Commission, upon forms to be provided by the Commission, of the full consideration for such transfer including, without limitation however, the nature and extent of any direct or indirect amortization of the consideration for such transfer. In the event any part or all of the considera-

tion to be paid to the transferor of his earned base shall be delayed beyond the date of delivery of control and possession of such "earned base", then in that event the title to such "earned base" shall be retained by the transferor during and throughout the full amortization of the consideration paid therefor. During such amortization period the Commission shall treat the earned base as if it were the property of the transferee provided the amortization schedule filed shall have been currently maintained by the transferee. The Commission may, upon default by the transferee, merge the legal and equitable title in the transferor.

B. Chapter 25, Section 1 and Section 3, Laws of Florida, 1845, Pages 42, 43, and 44:

Section 1. Be it therefore enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened, That the United States be, and they are hereby authorized and empowered to purchase, acquire, hold, own, occupy and possess such land or lands within the limits of this State as they shall adjudge it expedient, and shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States, said purchases to be effected either by contract with the owner or owners of said land or lands, or in the manner hereinafter provided.

Section 3. Be it further enacted, That whenever the United States shall contract for, purchase or acquire any land or lands within the limits of this State for the purposes aforesaid, in either of the modes above mentioned and provided, and shall desire to acquire constitutional jurisdiction over such land or lands for said purposes, it shall and may be lawful for the Governor of this State, upon made to him in writing, on behalf of the United States, for that purpose, accompanied by the proper evidence of said purchase, contract, or acquisition of record, describing the land or lands sought to be ceded by convenient metes and bounds, and the said Governor shall be, and he is hereby authorized and empowered, thereupon, in the name and on behalf of this State, to cede to the United States exclusive jurisdiction over the land or lands so purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess, and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever. **Provided, always,** that the consent aforesaid is hereby given, and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this State shall retain a concurrent jurisdiction with the United States in and over the land or lands to be ceded, and every portion thereof so far that all process civil or criminal, issuing under the authority of this State, or of any of the Courts, or judicial officers thereof, upon any person or persons amenable to the same, within the limits and extent of the land or lands so ceded, in like manner and to like effect, as if this act had never been passed; saving, however, to the

United States security to their property within said limits and extent, an exemption of the same, and of said land or lands, from any taxation under the authority of this State, whilst the same shall continue to be owned, held, used and occupied by the United States for the purposes above expressed and intended, and not otherwise.

[Passed the Senate July 17th, 1845. Passed the House of Representatives July 21st, 1845. Approved by the Governor July 24th, 1845.]

• • • • • • • • •

C. **Florida Statutes, 1961, Page 3.**

§602 United States authorized to acquire lands for certain purposes.—The United States may purchase, acquire, hold, own, occupy and possess such lands within the limits of this state as they shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States; such land to be acquired either by contract with owners, or in the manner hereinafter provided.

History—§1, ch. 25, 1845; RS 7; GS 5; RGS 5; CGL 5.
cf.—§§6.06, 253.21, Swamp and forest lands.

§§264.06-264.10, Everglades National Park.

APPENDIX "E"

PERTINENT GEORGIA STATUTES

The Georgia law provides in pertinent part:

ACT NO. 373, Georgia Laws of 1927, Pages 352 and 353. U. S. GOVERNMENT, JURISDICTION CEDED TO.

NO. 373.

An Act to provide for the acquisition of land in the State of Georgia by the United States for governmental purposes; to cede jurisdiction to the United States under certain limitations; and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, and the consent of the State of Georgia is hereby given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government.

Section 2. Be it further enacted by the authority aforesaid, that the exclusive jurisdiction in and over

any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the State retains the right to serve thereon all civil and criminal processes issued under authority of the State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

Section 3. Be it further enacted by the authority aforesaid, that the jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under authority of the State.

Approved August 23, 1927.

ACT NO. 851, Georgia Laws of 1953, Pages 264 & 265: STATE JURISDICTION OVER CEDED TERRITORY.

Code § 15-302 Amended.

No. 851 (Senate Bill No. 265).

An Act to amend Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United

States over certain lands in this State so as to provide that the State shall no longer retain its civil and criminal jurisdiction over persons and citizens of any ceded territory used by the Department of Defense; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia as follows:

Section 1. Section 15-302 of the 1933 Code of Georgia relating to the jurisdiction of the United States over certain lands in this State is amended by inserting after the word "State" at the end of the second sentence thereof the words "except as to any ceded territory owned by the United States and used by the Department of Defense but the State retains jurisdiction over the regulation of public utility services in any ceded territory," so that said Section when so amended shall read as follows:

"15-302. Exclusive jurisdiction in and over any lands so acquired by the United States is hereby ceded to the United States for all purposes except service upon such lands of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. The State retains its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State, except as to any ceded territory owned by the United States and used by the Department of Defense, but the State retains jurisdiction over the regulation

of public utility services in any ceded territory. Nothing herein shall interfere with the jurisdiction of the United States over any matter or subjects set out in the Acts of Congress donating money for the erection of public buildings for the transaction of its business in this State, or with any laws, rules, or regulations that Congress may adopt for the preservation and protection of its property and rights in said ceded territory, and the proper maintenance of good order therein."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 15, 1952.

LIBRARY,
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 23 1963
JOHN F. DAVIS, CLERK

Supreme Court of The United States

OCTOBER TERM, 1963
NO. 38

POLAR ICE CREAM AND CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF OF APPELLEES

MALLORY E. HORNE, ESQ.,
P. O. Box 1140
Tallahassee, Florida,
JOHNSON S. SAVARY, ESQ.,
Inverness, Florida,
Attorneys for Appellant.
RICHARD W. ERVIN, ESQ.,
Attorney General of Florida
JOSEPH C. JACOBS, ESQ.,
Asst. Attorney General of Florida

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 38

POLAR ICE CREAM AND CREAMERY COMPANY,

Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF OF APPELLEES

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1-3
BACKGROUND	3-7
SUMMARY OF ARGUMENT	8-11
ARGUMENT	
QUESTION ONE	11-24
QUESTION TWO	24-27
CONCLUSION	28-29
PROOF OF SERVICE	30

TABLE OF CITATIONS

Cases *Page*

Alderman vs. Puritan Dairy, 146 Fla 345, 1 So 2d 177 4

Baldwin vs. Seelig, 294 U. S. 511 ..... 8, 10, 17, 18, 19, 20, 21, 27

Borden Company, a corporation vs. J. Bailey Odham, et al, 121 So 2d 625 ..... 8, 15, 16, 17

Daoud vs. Matx Fla 1954, 73 So 2d 51 5

Highland Farms Dairy, Inc. vs. Agnew, et al, 300 U. S. 608 ..... 9, 18

Lehigh Valley Coop vs. U. S., 370, U. S. 76 (1962) 22, 23

Miami Home vs. Milk Control Board, 124 Fla 797, 169 So. 541 4

Milk Commission vs. Dade County Dairy, 145 Fla 579, 200 So 83 5

Milk Control Board of Commonwealth of Pennsylvania vs. Eisenberg Farms Products, 306 U. S. 346 ..... 8, 19, 20

Nebbia vs. New York (1934) 291 U. S. 502, 52 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469 ..... 3, 8, 16, 18

Paul vs. United States, 9 L. ed. 2nd 292 9

Shiver vs. Lee (1956) 89 So. 2d 318 ..... 4, 8, 16

Texas Co. vs. Brown, 67 L. ed. 721, 258 U. S. 466 ..... 10, 26

U. S.-Pure Oil Co., vs. State of Minnesota, 63 L. ed. 180 ..... 11, 26

U. S. vs. Lee, 13 So. 2d 919 27

STATUTES

Chapter 501, Florida Statutes 4, 5, 6, 8

Chapter 501.09, Florida Statutes 10, 24, 26

Chapter 501.13, Florida Statutes 8, 14

Chapter 501.18, Florida Statutes 19

TEXTS

Corpus Juris Secundum, Vol. 15, Page 58 26

QUESTIONS PRESENTED

QUESTION ONE

IS CHAPTER 501, FLORIDA STATUTES, AND ORDERS ENTERED BY THE FLORIDA MILK COMMISSION PURSUANT THERETO UNCONSTITUTIONAL AS BEING IN VIOLATION OF ARTICLE I, SECTION 8 (COMMERCE CLAUSE) AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

QUESTION TWO

CAN THE STATE OF FLORIDA COLLECT FROM A DISTRIBUTOR OF MILK, WHOSE PLANT FACILITY IS PHYSICALLY WITHIN THE DEFINED BOUNDARIES OF FLORIDA, A TAX OR REGULATORY FEE CALCULATED UPON THE GALLONAGE OF MILK DISTRIBUTED THEREBY FOR THE PRIVILEGE OF CONTINUING IN OR ENGAGING IN THE BUSINESS OF DISTRIBUTING MILK, NOTWITHSTANDING THAT SOME OF THE GALLONAGE UPON WHICH SAID CALCULATION IS ACCOMPLISHED IS REGULARLY SOLD TO AN AGENCY OF THE UNITED STATES OF AMERICA?

STATEMENT OF THE CASE

The Appellees agree with the statement of the case as submitted by the Appellant, except as to the following particulars.

Paragraph one of part one of said statement (appearing on Page 5 of Appellant's Brief) states that:

"Testimony was taken and arguments held with reference to the following issues:
"(1) Whether Chapter 501, Florida Statutes, and the reg-

ulations and orders of Defendant, as applied to milk delivered by Plaintiff to military reservations, are constitutional."

No testimony was taken and arguments were not heard with reference to such an issue. Attorneys for Appellees and Appellant stipulated at the pretrial conference below that this issue had become moot. The Honorable Harrold Carswell, Judge of the United States District Court for the Northern District of Florida, entered an Order on February 21, 1962, discharging a temporary injunction theretofore entered involving the utilization of milk sold by Appellant on military installation "for the reason that the acts sought to be restrained *are no longer involved and the issue has become moot*" (R-75). (Emphasis supplied). At the trial below Judge Carswell stated that "we were through with military milk questions . . ." (R-96). The attorney for Appellees stated at the trial below "I believe that this clarifies the issues insofar as the military contracts are concerned." The sum of this is that the only remaining involvement with military milk relates solely to the authority of the State of Florida to collect the regulatory fee imposed on milk distributed by Plaintiff to military installations. Accordingly, the voluminous amount of testimony establishing the extent of Appellant's involvement with military sales is material only insofar as indicates the extent of the regulatory fee which would be unconstitutional should Appellant prevail on that point. It is particularly significant to note that there was, at the time of this trial below, NO ORDER, NO REGULATION, NO ATTEMPTED INVOLVEMENT WITH RESPECT TO THE ACQUISITION OF MILK TO BE SOLD BY APPELLANT TO MILITARY INSTALLATIONS. In short, this aspect of Appellant's business was exclusively one of uncontrolled negotiation and contract. (R-149)

Appellees do not quarrel with that part of the statement of the case entitled "2. OPINION OF THE DISTRICT COURT." Most of that aspect entitled "3. BACKGROUND"

is one of artful argument and debate rather than accurate statement of fact. For instance, on page 11 of Appellant's Brief, it is stated:

> "Conversely, it (alluding to an order of the Florida Milk Commission on classification of milk) provided that the Class II and other lower class sales of which Florida producers were formerly absorbing a fair share would be allocated to the out of state milk purchased by Polar and the other distributors."

No order of the Florida Milk Commission provides as is represented here by Appellant. They might reasonably argue that such might be the effect, but to represent such a proviso to this Court is at best a departure from fair writing. Because of this, Appellees challenge the entirety of that part of the statement of the case entitled BACKGROUND and respectfully submits the following in lieu thereof:

BACKGROUND

It may be helpful to the Court for Appellee to briefly explain the industry involved in this litigation. Florida's milk price control law, like that of other states having it, is modeled after New York's law. New York's law, in a precedent making decision, was upheld as constitutional under police power by the Supreme Court of the United States in the case of *Nebbia vs. New York, 1934, 291 U. S., 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469.* Because of that, most, if not all, of subsquent state legislation in this field was patterned after the New York act.

At the present time, legislation authorizing the control of the price of milk is in force in many states and by the Federal Government.

Florida's milk price control act is contained in Chapter 501, Florida Statutes. It is valid legislation and constitutional under the state's police power. *Miami Home vs. Milk Control Board, 124 Fla. 797, 169 So. 541. Shiver vs. Lee (1956), 89 So. 2d 318. Milk Commission vs. Dade County Dairies, 145 Fla. 579, 200 So. 83. Alderman vs. Puritan Dairy, 146 Fla. 345, 1 So. 2d 177.*

It was in *Shiver v. Lee*, supra, that the Court, in commenting on the findings of the legislature contained in Chapter 501.01, said:

> "We have never found a stronger finding of fact and statement of policy as the basis for regulating and administering a great industry than that embodied in the two paragraphs preceding this for control of the milk industry. Chapter 19231, Acts of 1939, from which Chapter 501, Acts of 1953, was in the main drawn, was a complete departure from the milk control acts, in that it recognized the necessity for control and supervision of the milk industry. One cannot read the findings of facts and statement of policy without being convinced that the paramount purpose of the legislature was to invoke the police power for protection of the public health, safety and welfare as well as the welfare of those engaged in the milk industry. Every legislature since said act was passed has amended and strengthened it and the 1955 legislature refused to repeal or modify it."

and

> "A casual reading of the legislative findings shows that the milk industry had through devious means become a sick business, that an adequate supply of fresh, wholesome milk for the public had become imperiled and that it was necessary for the protection of the public, the consumer and producer to impose rigid restrictions and price fixing. It would be difficult to point out a more convincing case for legislative intervention."

The opinion of the court below, written by District Judge Harrold Carswell, cited specifically the language hereinabove noted (R-188).

As the orders here involved are base fixing and price fixing orders of the Florida Milk Commission, some background on the pricing methods and structure adopted by the Milk Commission of Florida to comply with the legislative requirements set forth in Chapter 501, Florida Statutes, might be first appropriate. (This Court takes judicial notice of matters known to informed people—*Milk Commission vs. Dade, 145 Fla. 579, 200 So. 83*), and of Administrative Rules (*Daoud v. Matz, Fla. 1954, 73 So. 2d 51*).

While it costs the producer just as much to produce each gallon of milk, whether that milk is utilized as fluid milk for consumption or in manufacturing ice cream, cottage cheese or in any other way, the distributor's return from his sales varies according to its utilization by him. The distributor is able to sell the Class I or fluid milk for the highest price, the Class II, III and IV milk at lower prices.

So, the Florida Milk Commission, like at least some agencies in other states, has adopted utilization pricing (it is authorized to do so under Chapter 501, Florida Statutes), under which the distributor pays the producer the highest price for the Class I milk, a lower price for Class II, III and IV milk. Such utilization pricing is for the benefit of the distributor and in recognition of his utilization of milk in different ways at different returns to him. It helps also in discouraging over-production, as the producer is paid less than the cost of production for Class II, III and IV milk.

In doing so, however, the Commission, in setting the minimum prices to be paid producers for the various classes of milk, must

also comply with the requirements of Chapter 501, Florida Statutes, that the producer receive a reasonable return for his milk. The price he receives for his Class I milk is above the cost of production and is a fair return; the price he receives for his Class II, III and IV milk is below his cost of production and fair return; the average or "blend" price that he receives must be considered. In addition, there must be some formula or implementation by which the distributor can determine the amount to be paid each producer each month.

So, the Commission, in fixing prices and adopting the formula, in its base plan order provided that, in computing amounts to be paid producers the total utilization by the distributor, regardless of source, would be considered and any milk transferred or diverted would be allocated according to its final utilization, and fixed its minimum prices accordingly.

As an illustration of the mechanics involved, assume the amount to assure a producer a reasonable return in compliance with the statute has been determined to be $.5610 a gallon. Assume further the distributor receives from his local producers 100 gallons of milk and from other sources 5 gallons. Assume also the distributor diverts 15 gallons of milk, with its final utilization as Class I milk, and that the remaining total balance of 90 gallons is utilized by him as follows:

65 gallons as Class I milk
15 gallons as Class II milk
10 gallons as Class III milk
No utilization in Class IV milk

and that the price to be paid the producers is $.61 for Class I milk, $.40 for Class II milk, and $.26 for Class III milk.

Under the Commission's orders, the 15 gallons of diverted milk is counted as Class I milk in calculating amounts to be paid

the producer, and the producer would therefore be paid as follows for his 100 gallons:

80 gallons at Class I price	$48.80
15 gallons at Class II price	6.00
5 gallons at Class III price	1.30
No utilization in Class IV milk	
	$56.10

For his 100 gallons the producer receives a "blend" price of $.5610 a gallon, or the predetermined reasonable return.

But, assume the distributor, as in the case here involved, tried to pay for the diverted milk at only $.43 a gallon. The producer is then paid as follows:

15 gallons at $.43	$ 6.45
65 gallons at Class I price	39.65
15 gallons at Class II price	.6.00
5 gallons at Class III price	1.30
No utilization in Class IV milk	
	$53.45

The producer gets, for his 100 gallons, a "blend" price of only $.5345 a gallon. And the intent of the Commission's pricing structure would be circumvented and the legislative purpose thwarted.

For simplicity, the foregoing ignores butterfat price differential calculations, and other details showing calculation of producer settlements. It should also be pointed out that the producer, by over-production of milk, either at his own volition or because of encouragement by his distributor, can lower his blend price. Utilization pricing itself tends to discourage such; the Commission, through other orders not here involved, also attempts to discourage and control over-production.

SUMMARY OF ARGUMENT

I. FLORIDA MAY CLASSIFY MILK AND REQUIRE ITS NATIVE DISTRIBUTORS TO PAY ITS REGULAR BASE-EARNED PRODUCERS A REASONABLE PRICE FOR EACH OF SUCH CLASSES OF MILK.

The decision of the District Court is plainly correct. *Chapter 501, Florida Statutes,* has been upheld many times as constitutional and not in violation of the Commerce Clause, Due Process and Equal Protection of the Law under the United States Constitution.

As the supreme court of Florida stated in the leading case of *Borden Company v. Odham, 121 So. 2nd 625:*

> "These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 *Lawyers' Edition* 940 and *Shiver v. Lee, supra.*".

Needless to say, this Court has upheld legislation like Chapter 501, Florida Statutes, many times beginning with the landmark in this field of *Nebbia v. New York, 291 U. S. 50, 78 L. Ed. 940.*

As the District Court said, the Appellant relies most heavily upon the case of *Baldwin v. Seelig, 294 U. S. 511,* for the proposition that *Section 501.13 (8), Florida Statutes,* is unconstitutional as a restraint on interstate commerce. The Court clearly distinguished the Baldwin case with the case at Bar as this Honorable Court distinguished the Baldwin case with the case of *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products, 306 U. S. 346.* In

upholding the constitutionality of Pennsylvania's "milk laws", this Court made some observations in Eisenberg that are particularly appropriate to this cause and appear in our argument in chief.

Another case which is controlling in upholding the exercise of the police power here involved is *Highland Farms Dairy, Inc., v. Agnew et al, 300 U.S. 608.*

In short, the cases are legion upholding the constitutionality of such regulatory acts and the Apellant, as the District Court said, has failed to sustain the burden of proof that there has been an illegal application of Appellee's power to establish minimum producer prices upon Appellant.

II. FLORIDA IS NOT IN VIOLATION OF THE PROCUREMENT POLICY OF THE UNITED STATES OR THE DOCTRINE OF *PAUL v. UNITED STATES*, 9 L. ed. 2nd 292, IF IT ATTEMPTS NO REGULATION IN THE ACQUISITION OR SALE OF MILK TO A MILITARY INSTALLATION.

Though stated as a question involved by Appellant, and argued extensively in their Brief, there simply is no involvement in this appeal with the so-called military milk question. Prior to the trial of this cause, the Court below said this question had become moot (R-75). The crux of Appellee's position to this point is simply that the doctrine enunciated by this court in *Paul v. United States* is not applicable. There is no order, regulation or enforcement of any price to be paid by this distributor to any producers for milk going to military installations. On the other hand, there is no order, regulation or enforcement of any price at which this distributor must sell his product to the military. According to Appellant's testimony, he can buy all the milk he ever wants without seeing another Florida producer and buys approximately seventy per cent

(70%) of his product extra-territorially (R-129). The matter of acquisition of milk by this Appellant for servicing of military contracts is one of open and bilateral negotiation. There is no testimony in this record to the contrary, so the matter should not be considered as a question involved.

III. THE SANCTITY OF GOVERNMENTAL CONTRACT IS NOT VIOLATED WHEN A REGULATORY FEE DOES NOT ENVISION NOR TAX THE TRANSCACTION WITH THE UNITED STATES BUT RATHER EXACTS A REASONABLE SUM BASED UPON GROSS GALLONAGE OF BUSINESS BY A DISTRIBUTOR CALCULATED TO FINANCE THE REGULATORY FUNCTION ONLY AND NONE OF WHICH FUNDS DERIVE TO THE GENERAL REVENUE FUND OF THE STATE OF FLORIDA.

The applicable *Florida Statutes, Section 501.09(6)* exacts the identical gallonage fee from distributors and producers in Florida (see Appendix "A"). It is calculated to produce funds sufficient only for the conduct of the regulatory body. This fee specifically abates when the net sum of it exceeds 125% of the budgeted needs of such regulatory body. Such funds are deposited into a trust account none of which can ever reach the general revenue fund of the State of Florida. From the foregoing, the Court quickly sees that this fee is not a tax imposed by the State of Florida upon the Government of the United States, thus violating the Supremacy Clause, Article I, Section 8, Clause 17 of the United States Constitution.

There is not any testimony here that the fee is excessive, constitutes a tax for revenue purposes or is imposed unfairly as to this distributor as compared to those of identical standing. This court, in *Texas Company vs. Brown, 258 U. S. 466, and Baldwin v. Seelig, 294, U. S. 511*, said that such a regulatory fee

may only be attacked if it is so excessive as to constitute a tax for revenue purposes and thus imposing a burden upon interstate commerce. The Court below held this fee to be one upon the privilege of doing business in the State of Florida and not a tax upon the milk or upon the transaction with the Government of the United States. It is generally held that a state may charge a fee reasonably sufficient to meet the expenses of the inspection as an incident to its power to make valid regulatory and inspection laws and such a fee is not properly assailable as a burden on interstate commerce (*U. S. Pure Oil Company vs. State of Minnesota, 63 L. ed. 180.* Florida's regulatory fee, therefore, should be sustained and the Order of the Court below upheld.

ARGUMENT

QUESTION *ONE*

IS CHAPTER 501, FLORIDA STATUTES, AND ORDERS ENTERED BY THE FLORIDA MILK COMMISSION PURSUANT THERETO UNCONSTITUTIONAL AS BEING IN VIOLATION OF ARTICLE I, SECTION 8 (COMMERCE CLAUSE) AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

The Appellees feel constrained, in explanation for the redefinition of points here involved, to present to the Court, before embarking upon the principal argument, its bewilderment at the variance between the allegations of the Complaint, the questions presented here, and the proof at trial. Unless this procedure is foreign to all others, the issues are created and defined by the pleadings and narrowed by subsequent Orders of the Court. Appellant obtained access to this Court and its power to restrain by utilization of an array of broad general allegations of fact which create impressions of an exercise of extra

territorial jurisdiction by the Florida Milk Commission. Some of these allegations are:

> "• • • The Florida Milk Commission has at all times taken the position that the Plaintiff must buy *all its requirements of milk from Florida* producers at a price to be fixed by the Florida Milk Commission • • • Out of state milk cannot be purchased by Plaintiff, in accordance with the interpretation of the law by Defendants, until after all Florida milk, including surplus milk which *might be shipped from any place in Florida* to the Plaintiff, has been exhausted." (Paragraph 43 of Amended Complaint) Emphasis supplied.

No testimony to substantiate this allegation was even attempted. In fact, it was belied when the President testified that 70% of the milk used in his plant is purchased from outside of Florida (R-132). There was not one single question asked to produce one shred of evidence that this Appellant ever accepted or was asked by the Florida Milk Commission to accept any milk from a Florida producer other than those connected with his plant.

The other reason for our re-statement of the Questions Presented is the part the military question plays in this proceeding. Prior to the trial below, the writer of this Brief had become convinced that by stipulation and court order (R-75) we were no longer involved with it. However, much of the testimony below and the overwhelming majority of the exhibits introduced and a bulk of the Brief of Appellants here attempts to re-introduce the question of "military milk" into this cause. In addition, the attorney for Appellant in the closing moments of his argument to the Court below (R-164) romped back on this very subject which had "become moot" when he said, "and we say this, that the right to the contract is impaired by the prohibition contained in the Milk Commission Order with respect to the pricing of milk delivered at military installations,

* * *". Since the Court below continued to be intrigued, at trial, with the military question, this brief will endeavor to explain, while not conceding, that it is in any way involved with this proceeding. It is ironical that the Appellant originally came into this Court expressing a great desire to purchase distress milk throughout this nation in the fulfillment of its military contracts and contending that the military milk order of the Florida Milk Commission prohibited them from exercising this right. (Since the filing of that Complaint, the military order of the Milk Commission no longer is in existence (R-75)). In fact, THERE IS NO CONTROL WHATSOEVER UPON THE DELIVERY OF MILK TO SUCH AN INSTALLATION (except the question of the regulatory fee hereinafter argued). Since this destroyed their effort to scream prejudice, they now pose PURE CONJECTURE to the Court in an effort to inflame you. Pause here, if you will, and examine that statement. Was there any testimony in this record to the effect that this Appellant or any other distributor had ever been told that he had to pay any particular price for milk going to a military installation, or that he could not use milk from any source in the fulfillment thereof? Not one word even suggesting such a course. Now the lawyers would ask the Milk Commission *what it would do if* they elected to purchase Florida milk to go to military installations. By this process, the attorneys for Appellant artfully asked the Court to decide a question that might develop in the future. Since the Court was interested, I might reiterate that this is totally conjectural in view of the testimony of Appellant that he could buy all the milk he ever wants without ever seeing another Florida producer (R-129). So we see that the Complaint was that he wanted to be free to buy Wisconsin distress milk. After we told him he would buy it from every state in the union for $.02 a gallon so far as our regulations are concerned, then he decides to say, no, we want Florida milk and you are regulating that. *The specific point*

here is that there is no Florida regulation pertaining to the sale of milk on military installations. Since there is none, he and a Florida producer would be upon the open market of free negotiation in a determination of the price at which the Appellant would buy and the producer would sell the milk to be so utilized. It amazes me that this absence of any control could give impetus to such misunderstanding and a label of unconstitutionality against the Florida Milk Commission.

Returning to the question posed, it is suggested that the real crux of this controversy quickly becomes the so-called "base plan" adopted by the Florida Milk Commission (Appellee) without which no price order would justify the paper upon which it was written. The Florida base order, classification order and matters pertaining thereto are quoted for your convenience in the appendix.

Classes II, III and IV as defined (see Appendix B) can be considered as surplus milk for which a distributor cannot be required to pay more than the market value, in Florida, of the component parts thereof, *501.13 Florida Statutes, 1963* see Appendix A). To explain how this is accomplished to the complete fairness of distributors, you may take notice of the fact that the southeastern portion of Florida is not under the jurisdiction of the Florida Milk Commission. This area is regulated by certain Order of the United States Department of Agriculture. The Federal agency promulgated in 1957 its Order No. 188 regulating the handling of milk in this marketing area. *This Order provides uniform minimum prices to be paid producers by classes of milk.* This Federal Order utilizes a mathematic formula to be applied to the price to be paid on the Chicago market for the constituent parts of milk (a recognized market price). Since they do such a good job of this, the Milk Commission sets the prices for the Florida classifications for the monthly market findings by the Federal Order. This price, of course, fluctuates and you see, immediately,

that if there was no market for these component parts of milk, then there would be no price and the distributor would not be compelled to do anything but dump and pay nothing.

Factually, the above mentioned orders of the Appellee are propelled into significance by virtue of the contention of Appellant that the net effect thereof is to limit his acquisition of milk at the best available market. Appellant points to the testimony indicating that from time to time surplus milk in different areas of the nation can be bought at distress prices and utilized by him to his economic advantage. By this argument, Appellant, in effect, admits that he seeks a ruling, the effect of which would be to allow him to skip across the nation in pursuit of surplus milk and be required to purchase only what he wishes from his local dairy farmers. If Wisconsin happened to be in surplus for a couple of weeks he would have destroyed all of the dairy farmers attached, by the above cited order, to his distribution plant. Cows cannot be turned off when a market diminishes. They must be milked. The price order then would be as ineffective and unenforceable as if it did not exist.

The Florida Supreme Court has considered the identical question presented by this appeal in *Borden Company, a corporation, v. J. Brailey Odham, Chairman, et al, 121 So 2nd 625.* In 1957 the Florida Milk Commission established prices for three (3) different classifications of milk (now four are in effect). Subsequent to this action by the Commission the Plaintiff distributors, in the Borden case, informed their producers of a policy not to accept milk in excess of Class I requirements, and filed a complaint seeking relief against the enforcement of the price and classification orders. Of note in that case is that prior to this order the same distributors customarily accepted all of the milk produced and delivered to them, utilizing as much as possible in Class I channels and according to the producers in all milk in excess thereof upon prices determined

by the distributors to be the value of the butterfats and serum solids recovered from such excess milk. The chief contention in this *Borden Case*, supra, was that the provisions of this order would deprive them (the distributors) of their liberty of contract and of their property without due process of law in violation of section 12 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the United States Constitution (argued here by Appellant). The Court clearly and succinctly recited the statutory powers of the Milk Commission and exhaustively delineated the reasons therefor. I shall not belabor that aspect of the opinion but quickly will point to the fulcrum of the decision.

The Court, in *Borden Company v. Odham*, supra, said:

"These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 Lawyers' Edition 940 and Shiver v. Lee, supra.*"

The Court went further to say, in effect, that no other way had been devised to carry out the purpose of such acts and that so long as a commission acts within reason it may require a distributor to take all of the producers milk.

Further from the *Borden case*, supra:

"We do not think the construction of the law as applied to appellants is unconstitutional. In fact we do not see that the Commerce Clause of the Federal Constitution has any proper place in the argument. We have been shown no reason why Chapter 501, Florida Statutes, F.S.A., is not well within the police power of the legislature to promulgate. The powers vested in the Commission contemplates the protection of the public, the producer and the distributor of milk. The powers of the Commission must be reasonably

exercised and there is no showing here that they have been imposed in an unreasonable or harsh manner. As to that aspect of Appellants' grievance directed to the price-fixing and other orders of the Commission, the provision for notice, hearing and an opportunity to be heard remove this objection and there is no showing that appellants suffered from these or failure to invoke them. It is accordingly our view that the Chancellor correctly held that infringement of liberty of contract as constitutionally understood, the violation of due process or the Commerce Clause, or any of them, are not shown here."

Every facet of question one presented in this appeal was considered meticulously by the Circuit Court in a thirty page written Order which was affirmed by the Supreme Court of Florida in the case of *Borden v. Odum*, et al, supra.

The major contention of Appellant is, of course, founded upon the Commerce Clause and comfort gained by the citation of *Baldwin v. Seelig, 294 U. S. 511*. In this particular case, the New York Statute was involved and a New York distributor who was purchasing milk in Vermont and transporting it into in New York in kind and, in fact, in the very cans in which it was transported in commerce. There was one principal distinction between Baldwin and the case presented to this Court, viz, the State of New York applied a law to such a transaction which said, in effect, that it is unlawful for a distributor to sell any milk purchased in another state under any circumstances in New York unless that importing distributor had paid to the producer in the other state (Vermont) the same price that the state of New York required distributors to pay New York producers. *There is no such law in question here nor any testimony that such an interpretation has ever been mentioned by the Florida Milk Commission.* There is, however, one aspect of the *Baldwin case* which is worthy of note. The Supreme

Court of the United States said here, at the outset of its decision:

> "The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. *The validity of that system in its application to producers doing business in New York state has support in our decisions.*" (Emphasis supplied)

Of course, they quore the hallmark in this field, *Nebbia v. New York, 291 U. S. 50, 78 L. ed. 940.*

The next significant case which appears to be controlling upon the question here presented is *Highland Farms Dairy, Inc. v. Agnew, et al, 300 U. S. 608.* This decision dealt with several principles of law, some of which have been touched upon, though not too seriously, by the Appellant. Without belaboring these callateral issues. It is suggested to the Court that *Highland* stands for the proposition that,

(a) A milk control state statute is not unconstitutional as an unlawful delegation of legislative authority,

(b) A state milk control act is not invalid by reason of a provision establishing milk marketing areas and controlling such area independently, and

(c) The statute is not invalid for failing to prescribe the standards to be applied by state milk control board in granting a license or refusing them.

In this Highland case, the constitutionality of the Virginia Milk Control Act was in question. The Court recited the powers created by that statute which closely parallel the Florida act. Again, the Supreme Court, speaking through Mr. Justice Carddzo, who incidentally rendered the *Baldwin decision*, supra, commenced its decision by stating:

> "That the power of a state to fix minimum prices for milk in order to save producers, and with them the consuming public from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia vs. New York, 291 U.S. 502, 78 L. ed. 940.*

The Court made note of an aspect of the Virginia Act to the effect that none of the provisions

> "shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution. * * *."

This closely parallels *Florida Statute 501.18* Subsequent to both of the above cited decisions, the United States Supreme Court again considered the proposition presented to this Court. In *Milk Control Board of the Commonwealth of Pennsylvania vs. Eisenberg Farm Products, 306 U.S. 346,* Mr. Justice Roberts delivered the opinion of the Court. The Court said,

> "We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce."

The Court specifically set forth all of the powers of the Milk Control Board established by the Pennsylvania legislature in 1935. This brief shall not list them all except to include the last recitation by the Court, viz:

> "The Board may vary the price *according to the production, use, form, grade or class of milk.*" (Emphasis supplied)

The Court, in upholding the validity of the Statute and its specific application in this case stated:

> "One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the

state's citizens. *Every state police statute necessarily will affect interstate commerce in some degree,* * * *." (Emphasis supplied)

The Court, in Eisenberg, made some observations that sound as if they were talking of the case at Bar when it said:

"The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.

"If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable."

The Respondent in this case obviously relied, as does the Appellant here, upon *Baldwin v. Seelig*, supra. The Supreme Court, in dismissing that contention, said that in the *Baldwin case*,

"This Court condemned an enactment aimed solely at interstate commerce attempting to effect and regulate the price to be paid for milk in a sister state, * * *."

This is precisely the position taken by this Appellee at trial and in this brief in suggesting that Baldwin has nothing whatsoever to do with the determination of the case at Bar.

Before applying other enunciated principles of law to the questions here presented, the few gaps in the factual picture should be filled. It is important to realize that Appellant purchases milk all over the nation seasonly (R-127). The seventy percent (70%) of the total gallonage of milk used by Appellant in his distribution plant is attributable to all sales without reference to classifications of milk, for he keeps no record of classification (R-132). Appellant keeps no sales records and few, if any, accounting facts of his business are known to this Court or to anyone else. To specifically corroborate this contention reference to JUDGE WARREN JONES OF THE CIRCUIT COURT OF APPEAL BENCH, WHO HEARD THE TESTIMONY AND FORMED CONCLUSIONS BASED UPON HIS CONFRONTATION OF WITNESSES SAID:

> "UNLESS HE (speaking of Appellant) HAS A BETTER RECOLLECTION THAN HE HAD ON THE STAND, HE DIDN'T HAVE BOOKS, RECORDS, OR MEMORY, WHEN HE WAS ON THE STAND OF WHAT MILK HE GOT, WHEN, WHERE." (Emphasis supplied). (R-138)

In the negative, there is no testimony to the effect that Florida has the authority or the intention of even inferntially urging the Appellant or any other distributor in Florida to pay the producers of any other state, from which Appellant purchases any milk, any specific price for that milk. In short, the record discloses that Appellant pays, seasonly, as little as $.30 per gallon for distress milk in different parts of the country (R-127). Critical to Appellant's citation of *Baldwin v. Seelig*, supra, is this observation, for in *Baldwin*, the receiving state attempted to require the importing distributor to apply the producer prices of the receiving state to the producers extra-territorially from whom such a distributor purchased that milk.

Appellant cites with glee and apparent confidence the case of *Lehigh Valley Coop v. U.S., 370 U.S. 76 (1962)* in urging this Court to label the Florida milk regulatory act and orders adopted pursuant thereto as a trade barrier. This case actually expresses the continued support by the Supreme Court of the United States of regulations establishing minimum producer prices. Mr. Justice Harlan specifically said so in writing the opinion of the Court in this case. A critical analysis of the *Lehigh Valley* case to the one at Bar reveals that the crux of the case in Lehigh involved an Order of the Federal Administrator, the net effect of which was to require distributors of milk purchased from outside the federal milk market area involved to pay the "pool" producers of the federal milk marketing area a penalty (calculated upon a formula) for selling milk within that area. Please be mindful that under this Order under question in Lehigh, the processors or distributors were compelled to pay a price to market area producers NOT FOR MILK ACQUIRED BY THEM, NOT REPRESENTING A PURCHASE OF ANY KIND, but simply because those processors utilized milk purchased extra-territorially. There simply is no fact or factor involved in this appeal upon which the Lehigh case can be used as authority. The only support it gives Appellant is that an Order was knocked down as a trade barrier, for there is no comparable order or situation under the regulation by the State of Florida. By implication the Order was rejected by Mr. Justice Harlan, speaking for the Court, not so much because it was a trade barrier BUT BECAUSE THE COMPENSATORY ORDER ENUNCIATED BY THE FEDERAL ADMINISTRATOR EXCEEDED THE AUTHORITY OF THE CONGRESSIONAL ACT. In support of this, your attention is directed to the following quote from the opinion of the Court in the *Lehigh Valley Coop* case:

> "It is only if the secretary has been authorized by the statute to impose such economic trade barriers on the entry

> of milk into an area so as to protect the prices received by the pool producers, that the present compensatory payment plan can be sustained as 'necessary to effectuate' the expressly authorized provisions of this order."

This *Lehigh case* does not, in fact, express a repugnancy against some regulation of outside milk into a market controlled by the United States Government or by a state. If this observation is shocking to the Court after reading the Brief of Appellant, reference to this remark by Mr. Justice Harlan, for the Court, will justify it:

> "Some of the regional orders now in effect do not undertake any economic regulation of 'outside' or 'other source' milk. But it is quite obvious that under certain circumstances *some regulation of such milk may be necessary*." (Emphasis supplied)

In closing to this question, the Appellee simply suggests to the Court that the cases are legion upholding the constitutionality of such regulatory acts. We respectfully submit to the Court that there has been no testimony indicating the assumption by the Florida Milk Commission of any extra-territorial jurisdiction whatsoever. It was stipulated that this Appellant can purchase milk from every state in the union and pay whatever price his negotiations might provide. It is specifically represented to the Court that, unless he expresses a need for it, the Appellant need not participate in the acquisition of any temporarily surplus milk in any part of Florida except from the "base earned producers" connected with his plant. One specific point of interest is that Appellant has claimed hardship and oppression resulting from control by the Florida Milk Commission, AND YET HE CANDIDLY ADMITS THAT HE WAS REGULARLY PURCHASING MILK FROM THE IDENTICAL "BASE EARNED PRODUCERS" DURING THE YEARS THAT THE FLORIDA MILK COMMIS-

SION EXERCISED NO CONTROL IN THAT AREA. He further admits that he was paying $.61 per gallon for milk acquired from them (R-135). All of this was under free trade with each of them. Immediately after acquisition of control of this area by the Milk Commission, the Appellant, who now says he has been wronged, retroactively slashed prices to his producers from $.61 per gallon to $.56 per gallon to $.43 per gallon (R-136). The record simply fails to show that this Appellant has established a single fact which would support a single contention in this case.

QUESTION TWO

CAN THE STATE OF FLORIDA COLLECT FROM A DISTRIBUTOR OF MILK, WHOSE PLANT FACILITY IS PHYSICALLY WITHIN THE DEFINED BOUNDARIES OF FLORIDA, A TAX OR REGULATORY FEE CALCULATED UPON THE GALLONAGE OF MILK DISTRIBUTED THEREBY FOR THE PRIVILEGE OF CONTINUING IN OR ENGAGING IN THE BUSINESS OF DISTRIBUTING MILK, NOTWITHSTANDING THAT SOME OF THE GALLONAGE UPON WHICH SAID CALCULATION IS ACCOMPLISHED IS REGULARLY SOLD TO AN AGENCY OF THE UNITED STATES OF AMERICA?

The Appellee respectfully suggests that this question must be answered in the affirmative. Because of our re-definition of this question to confine the area presented to the Court to be one of determination of the efficacy of the regulatory fee set forth in 501.09 Florida Statutes, we are desirous of reminding the Court of out handling of the overall military question under our statement of the case called "Background". Suffice it to say, at this juncture, that there is no Statute or regulation appertaining to the acquisition or distribuion by Appellant to a military installation. Since a majority of the milk processed by

Appellant goes to military installations, and since he purchases this milk, admittedly, from all over the nation at prices ranging from $.30 per gallon up, and since the State of Florida involves itself to no degree in the price at which he sells his product to a military installation, it seems obvious that such cannot logically lead to a label of unconstitutional activity on the part of Florida. However, should the Court be impressed with the total conjecture of Appellant by propounding questions such as that posed by Mr. Harrell to his client (R-131).

"*If* he delivers Florida milk to a military base, he will have to pay $.61 per gallon for each gallon of Florida milk so delivered," I should like to respond to the conjecture so that this involvement might be totally erased from this case. Florida not only does not attempt to regulate the price Appellant sells milk to a military installation, it seems obvious that such cannot logi- for which he pays for such milk so delivered to a military installation, but instead there is simply no regulation concerning that aspect of his business. To specifically answer the question of Mr. Harrell as recited hereinabove, Florida takes the position only that if he is desirous of using Florida milk to fulfill a military contract, that he bi-laterally agrees with Florida producers for such milk. He cannot use their milk and unilaterally set the price therefor. I hasten to add, in closing this aspect of the brief that he is not, however, compelled to purchase any Florida milk for such a contract but is welcome to do so. There can be little serious question of the right of a state to impose a fee upon native industry, the amount of which is reasonably calculated to support the inspection and regulation of that industry. The question presented by Appellant is whether or not this fee is a reasonable one and whether or not, in its enforcement, it becomes a burden upon milk transported across the state line and processed in Florida by Appellant. To the question of reasonableness, I respectfully direct the Court's

attention to the further language of *Chapter 501.09, Florida Statutes*, wherein the Florida legislature provides:

> "• • • If at any time during a fiscal year the revenue received by the Commission under this Chapter exceed by at least twenty-five per cent (25%) the total amount of expenditures as budgeted by the Commission for that fiscal year, the payment of taxes provided for • • • in 501.09(4), on milk distributed by distributors, will be discontinued • • • for the calendar months remaining in that fiscal year • • •."

We see that by legislative expression the gallonage fee or tax collected as to this Appellant is not calculated to be punitive nor productive of general revenue funds for general state purposes. It is clear that the funds are to be used solely for the purpose of inspecting and regulating this critical industry. *Corpus Juris Secundum, Vol. 15, page 58*, states:

> "As an incident to its power to make valid inspection laws, a state may charge a fee reasonably sufficient to meet the expenses of the inspection and such a fee *is not properly assailable as a burden on interstate commerce*." (Emphasis supplied)

As an authority for this comment, *U.S.—Pure Oil Co., vs. State of Minnesota, 63 Lawyers' Edition 180*, is cited. In *Texas Co. vs. Brown, 67 Lawyers' Edition, 721, 258 U.S. 466*, it was stated that the only manner in which such a regulatory fee may be subject to attack is that it is so excessive as to constitute, in effect, a tax for revenue purposes and therefore void as imposing a burden on interstate commerce. Exposing the gallonage tax of Florida to this rule, there certainly can be no reasonable logic to an argument that it is so excessive as to constitute a general revenue measure. Certainly here the sums collected can never reach the state's general revenue and the tax or fee abates when the inspection and regulation board is assured of

sufficient funds for that purpose. *NOTE* that none of these cases say that such a fee cannot *effect interstate commerce*. There is no validity to the contention that this constitutes a tax upon the U. S. Government for by the very language of the statute, it is a privilege license fee based upon a gallonage. A very similar situation is presented in *U.S. vs. Lee, 13 So 2d 919*, wherein the Florida Supreme Court held that a Florida six cent ($.06) gasoline tax was levied upon the privilege of selling gasoline and was not prohibited by the mere fact that a dealer occasionally sold gasoline to the United States Government. The tax here is clearly upon a regulated licensee and not upon the United States. The Attorney General of Florida has ruled, in *Opinion No. 056-43* in complete accord with the position taken in this brief and required thereby the collection of the regulatory fee from distributors, even though they sold to military installations. The Court will note that no evidence was submitted which even attempted to prove excessiveness of tax or diversion to other state purposes or to the general revenue fund of Florida. One of the best expressions upon the efficacy of this tax is found in *Baldwin vs. Seelig, 294 U. S. 511*, which is treated more fully at other points in this brief. The Court there said:

> "A tax upon merchandise brought in from another state or upon its sales whether in original packages or not, after it has reached its destination and is in a state of rest, *is lawful* only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another state." (Emphasis supplied)

This should put to rest the tax contention of Appellant. By any standard or definition, it is a proper regulatory fee by a state upon a citizen and without discrimination as to sister states, citizens thereof or commerce between them.

CONCLUSION

Milk, our most important single food, has been subject to governmental regulation in this country for approximately a century. The necessity for the sanitary control of milk and dairy products, and the regulation of their quality, by appropriate administrative agencies is well established in American jurisprudence. All such reasonable regulation frequently has been upheld by the courts of last resort in this country.

Econonic control of the dairy industry by governmental regulation, including the power to fix prices, is of more recent development. It was initiated in 1933 and since that time has been sustained by the courts as a valid and constitutional exercise of the police power over an industry which is affected with a public interest.

At one time or another 29 States and the Federal Government have enacted legislation authorizing the regulation and control of this important industry. To use the language and logic of Judge Carswell in the opinion of the Court below (R-189):

> "It is the duty of the Court to sustain police measures unless it is clearly, plainly and palpably in violation of the Constitution. An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance. At best plaintiff's contentions are an earnest conflict of serious opinion, and the proof offered to sustain these contentions is quite insufficient to warrant the relief sought, and judgment is accordingly entered by appropriate order for the defendant."

The economic stability of the dairy industry as a whole and particularly that of the dairy farmer is precarious at best. The necessity of regulation to protect the substantial interest of the dairy farmer should not be viewed only in the light of seasonal surpluses from which distributors might at that moment

draw a supply of milk. Regular production units must be maintained in a relatively healthy position so that the end result might be a steady, wholesome supply of milk and milk products for this nation. This is done by state and federal regulation without which economic chaos would be the end result. To accomplish this regulation all areas of the industry, both production and distribution must pay reasonable regulatory fees, there being no testimony that any of such funds in Florida flow to the benefit of the general revenue fund, but are authorized exclusively by the regulatory body in the fulfillment of its function. Producers and distributors are treated alike and no testimony as to either excessiveness or singular application was submitted.

It is respectfully submitted therefore that the opinion and order of the lower court should be affirmed and the stability of this industry in Florida thereby guaranteed.

Respectfully submitted,

Mallory E. Horne
of HORNE & RHODES
Tallahassee, Florida
and
Johnson S. Savary
Inverness, Florida
Attorneys for the Appellees

RICHARD W. ERVIN
Attorney General
and
JOSEPH C. JACOBS
Assistant Attorney General
for the State of Florida

PROOF OF SERVICE

I, MALLORY E. HORNE, one of the attorneys for the FLORIDA MILK COMMISSION, and CHARLES O. ANDREWS, JR., Et al, Appellees, and scheduled to become a member of the Bar of the Supreme Court of the United States prior to the argument hereof, hereby certify that on the _____day of September, 1963, I served a copy of the foregoing Brief, together with Appendices, on the several parties hereto by mailing a copy in a duly addressed envelope, air mail, postage prepaid, to their respective attorneys of record, as follows: JOE J. HARRELL, of Jones and Harrell, 201 East Government Street, Pensacola, Florida, and J. A. McCLAIN, JR., Suite 615, Marine Bank Building, Tampa, Florida, Attorneys for Polar Ice Cream and Creamery Company, Pensacola, Florida.

Mallory E. Horne
of HORNE & RHODES
Tallahassee, Florida

and

Johnson S. Savary
Inverness, Florida
Attorneys for the Appellees

APPENDIX "A"

Applicable Florida Statutes

501.04 Powers of milk commission.—The milk commission is declared to be an instrumentality of the state for the purpose of attaining the ends recited in the legislative findings, and may:

(1) Supervise and regulate the entire milk industry of the state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk, cream and milk products, in any market established by the commission in the state; provided, however, that nothing contained in this chapter shall be construed to abrogate or affect the status, force or operation of any provision of any law relating to public health or sanitation, the purity of food or food products, (the public health law, the public service law, the state sanitary code), milk products law, except as provided for in §501.09(4), state ice cream law, or any local health ordinance or regulation; and provided, further, that nothing in this chapter shall give the commission power to make rules or regulations prohibiting the giving away gratis of milk or milk products in cases of charity.

(2) Investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state.

* * * * * * * * * * * * * *

(9) Make, adopt and enforce all rules, regulations and orders necessary to carry out the purpose of this chapter; hold hearings after reasonable notice thereof has been given; receive sworn testimony and evidence at hearings as to the reasonableness of any order, rule or regulation of the commission; reasonably classify and establish definite market areas, and provide different

rules, regulations and charges therefor; establish health and sanitary requirements. The commission after public hearing and investigation may fix the prices to be paid producers by distributors, milk dealers or producer-distributors in any market or markets; may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk; may establish the grades of milk; may establish reasonable rules and regulations for fair competition, and fix reasonable rules and regulations for the conduct of the commission's business and for the regulation of its employees; may require reasonable examinations of license applicants to test their general fitness to engage in any business defined in this chapter; may establish rules and regulations for hearings in keeping with the procedure herein authorized; may revoke, suspend or refuse to issue the license of any person hereunder for the violation of any rule, regulation or order of the commission, after due notice and a fair hearing as herein provided; may provide for the collection of license fees authorized by this chapter, and may regulate all matters reasonably incidental to the general or specific powers herein recited; may provide for deputy administrators in any market area created by the commission, with such authority as may be designated by the commission, including the power to investigate complaints, report violations of the commission's orders, and to have such other powers reasonable or incidental thereto, including the right to administer oaths, make investigations, conduct hearings when ordered by the commission, and on due notice to take testimony in connection with investigations of complaints, and to cause the same to be stenographically transcribed and reported and transmitted to the commission for final action thereon, together with such other authority as the commission may designate in keeping with the general powers and purposes created under this chapter.

501.05 Rules and orders of milk commission.—

(3) The relationship between a producer and a distributor, under which milk produced by the producer is regularly delivered to and accepted by the distributor, when once established, shall not be terminated either by the producer or by the distributor without just cause therefor, and the approval of the commission. Just cause will be considered by the commission as any cause deemed just by a prudent and reasonable man.

Arbitrary, capricious and vindictive reasons will not be considered as just cause for any such termination.

(4) The commission shall set a standard date as the date from which not less than ninety days written notice in writing and in advance must be given by the producer or the distributor involved to the other before any such theretofore established relationship may be terminated; unless such notice is given, such relationship will not be terminated, even though just cause exists for termination, unless just cause exists excusing the failure to give such notice.

* * * * * * * * * * * * * * *

501.09 Issuance, revocation, etc., of licenses to milk dealers.—

(3) (a) That a milk dealer has rejected, without reasonable cause, any milk delivered to and accepted by the milk dealer from a producer delivered by or on behalf of the producer in ordinary continuance of a previous course of dealing, or that a milk dealer has rejected without reasonable cause, or has rejected without reasonable advance notice, any milk tendered or offered for delivery to the milk dealer by or on behalf of a producer in ordinary continuance of a previous course of dealing. It is intended hereby to provide and require that a milk dealer shall not reject or refuse to accept any milk tendered or offered

for delivery by or on behalf of a producer in ordinary continuance of a previous course of dealing unless there exists reasonable cause for the rejection or refusal to accept such milk and unless the milk dealer has also given such advance notice as may be reasonable under the circumstances of intention to reject or refuse to accept such milk.

* * * * * * * * * * * * * *

(4) . . . On or before the tenth day of each month each distributor shall make a report under oath to the commission upon such form and containing such information as the commission shall prescribe, but each report shall specifically, and in addition to all other information which may be required by the commission, contain and set forth:

(a) The number of gallons of milk produced; the number of gallons of milk received; and the number of gallons of milk distributed by such distributor during the preceding calendar month; and

(b) The name and address of each producer or any other person from whom the distributor purchased milk for distribution during the preceding calendar month and the quantity of milk purchased from each producer or other person, and the price per gallon paid to each producer or other person for milk so purchased, and the number of gallons purchased by such distributor if such distributor be also a producer.

For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that

the monthly reports are required to be filed by the distributor with the commission as provided by this chapter.

. . . . . .

Any person subject to the provisions of this chapter failing or refusing to furnish any return required to be made or failing or refusing to furnish a supplemental return or other data required by the commission or who shall violate any of the provisions of this chapter, including failure to secure a license or who shall violate any valid rule or regulation of the commission, or who shall secure a license upon false or fraudulent application, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding six months and each offense and each day of violation shall constitute a separate offense.

. . . . . .

(6) For the privilege of continuing in or engaging in the business of producing milk, or acting as a dairy farmer under the provisions of this law, there is hereby imposed upon every dairy farmer a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of class 1 milk produced, as defined by the commission, by each such dairy farmer, and delivered to the platform of the distributor or producer-distributor during each calendar month. The amount of such tax shall be deducted by the distributor and the producer-distributor from the moneys due to the dairy farmer, and by such distributor or producer-distributor remitted to the commission at the time that the monthly reports are required to be filed by the distributors or producer-distributors with the commission, as provided by this chapter, and in the event the dairy farmer acts as his own distributor he shall remit the said tax to the commission at the time that the monthly reports are required to be filed by the distributor and producer-distributor with the commission, as provided by this chapter.

501.13. Order by commission fixing price of milk.—

(4) The commission after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the prices to be paid by milk dealers to producers and others for milk and its various grades and uses. The order of the commission with respect to the prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold, and may vary in different localities or markets according to varying uses and different conditions. Each order may classify milk by forms, classes, grades or uses as the commission may deem advisable and may specify the price therefor. A violation of this sub-division shall render such persons offending this chapter specifically subject to the provisions of §501.08.

(5) After the commission has fixed prices to be charged or paid for milk whether by class, grade or use, it is unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price or prices as shall be applicable to the particular transaction, whether by any discount, or rebate or free service, or advertising allowance or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

* * * * * * * * * * * * * *

(8) It is the intent of the legislature that the instant, whenever that may be, that the handling within the same by a milk dealer of milk produced outside of the state becomes a subject

of regulation by the state, in the exercise of its police powers, the restrictions set forth in this chapter respecting such milk so produced shall apply and the powers conferred by this chapter on the commission shall attach. After any milk so produced comes to rest within the state, any sale, within the state by a licensed milk dealer required by this chapter to be licensed, or any milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions is unlawful.

. . . . . .

501.18 Law declared not applicable to interstate commerce.—No provision of this chapter shall apply or be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

APPENDIX "B"

Pertinent Orders of the Florida Milk Commission

OFFICIAL ORDER 220-6.01 Definitions.

(1) Class I milk—All fluid milk or milk products sold in fluid form with the exception of buttermilk, chocolate drink and cream. For the purpose of calculating settlement by distributors or producer-distributors to producers for skim milk and fortified skim, the total sales in gallons of these products shall be multiplied by ninety-five per cent (95%) and added to all other sales of Class I milk.

(2) Class II—All skim milk and butterfat:

(a) Used to produce acidophilus milk, buttermilk, chocolate drink, half and half, light cream, heavy cream and sour cream, and

(b) Contained in inventories in the form of milk products designated as Class I milk on hand at the end of each month and accounting period;

(c) In total shrinkage or skim milk and butterfat, respectively, such shrinkage to be prorated to producer milk and other source milk received in the form of fluid milk or skim milk: provided, that Class II classification of shrinkage prorated to skim and butterfat, respectively, in producer milk shall not exceed two per cent (2%) of skim and butterfat in producer milk.

(3) Class III—All skim milk and butterfat:

(a) Used to produce any product other than those specified in subsections (1) and (2);

(b) That portion of fortified milk or skim milk not classified as Class I milk.

(c) All skim milk and butterfat to be classified shall be classified as Class I milk, unless the distributor who first receives such skim milk and butterfat establishes to the satisfaction of the Commission administrator that such skim milk and butterfat should be classified otherwise. Any skim milk or butterfat shall be reclassified if verification by the Commission administrator discloses that the original classification was incorrect.

(4) Class IV—All milk the skim portion of which is

(a) Disposed of for fertilizer or livestock feed, and

(b) Dumped after such prior notification as the Commission administrator may require.

OFFICIAL ORDER 220-6.08 (Sometimes called Base Order)

(6) BASE PERCENTAGE; COMPUTATION AND APPLICATION.

(a) During the base fixing period, a base percentage shall be determined for each producer by calculating the ratio of the milk delivered by each producer to the total milk delivered by all producers for the entire base fixing period, which percentage is referred to herein as "earned base." This computation shall be made immediately following the close of the base fixing period, and within thirty (30) days thereafter, each producer shall be notified by mail of his base percentage and the base percentage of all other producers participating in that particular base. During this period, each plant shall supply the local Deputy Administrator with a summary of its base computations. The producer notification must illustrate how the base percentage for the producer concerned has been determined.

1. The base percentage earned by each producer shall be applied to the total number of gallons of milk utilized in Class I channels by each distributor and producer-distributor to determine the number of gallons of milk for which the producer must be paid at the Class I price fixed by the Commission. In case a producer fails to produce the amount of milk that his "earned base" entitles him to, in Class I channels, such deficit must be reallocated to the other "earned base" producers in proportion to their "earned bases", and the Class I price paid for the milk so reallocated.

2. The method outlined above for computing allocations to Class I utilization shall be followed in computing allocations for all other classes.

3. First allocation of a producer's deliveries shall be to class I utilization, with allocation continued thereafter in descending order of price through Class IV classification. The balance of

any producer's production after the above allocations may then be placed in the lowest price classification.

4. In computing Class I sales to be allocated to producers, no adjustment shall be made for milk received by distributors and/or producer-distributors from sources other than "earned base" producers.

5. In computing milk utilization to be allocated to producers, milk transferred or diverted shall be classified and allocated according to its final utilization.

Office-Supreme Court, U.S.
FILED
OCT 17 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1963

No. 38

POLAR ICE CREAM AND CREAMERY COMPANY,

Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

REPLY BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY

JOE J. HARRELL, ESQ.,
201 East Government Street,
Pensacola, Florida,

J. A. McCLAIN, JR., ESQ.,
Suite 615, Marine Bank Building,
Tampa, Florida,
Attorneys for Appellant.

HARRELL, CARO & WILTSHIRE,
Of Counsel.

INDEX

PAGE

STATEMENT 1

ARGUMENT:

I. Florida's scheme for the regulation of milk in the Pensacola area discriminates against and burdens the flow of out-of-state milk into Florida, in violation of the Commerce Clause of the Federal Constitution 2

II. Florida cannot enforce her minimum producer price regulations as respects milk sold to Military installations, because to do so would violate the Federal procurement policy 8

III. Florida cannot enforce her distributor's privilege tax on sales to Military installations located on property to which exclusive jurisdiction has been ceded to the United States 10

CONCLUSION 12

CERTIFICATE OF SERVICE 13

CITATIONS

CASES: PAGE

Lehigh Valley Coop v. United States, 370 U.S. 76 (1962) 2

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 3

Paul v. United States, 9 L. ed. 2d. 292, 83 S. Ct. Rep. 426 ..... 8, 9, 10

Pure Oil Company v. State of Minnesota, 248 U.S. 158, 63 L. ed. 181 ..... 11, 12

Standard Oil Company vs. California, 291 U.S. 242, 78 L. ed. 775 11

Texas Company v. Brown, 258 U.S. 466, 67 L. ed. 721 12

United States v. Lee, 13 So. 2d 919 12

United States v. Warne, 190 F. Supp. 645 9

CONSTITUTION AND FEDERAL STATUTES:

Art. I, Sec. 8: Cl. 3 (Commerce Clause) 8

Agricultural Marketing Agreement Act of 1937, Section 8c (5)(G) 2

FLORIDA STATUTES:

Ch. 501, Secs. 501.05(3), 501.09(3)(a) 4, 5, 6

Ch. 501, Sec. 501.09 11

Supreme Court of the United States

OCTOBER TERM 1963

No. 38

POLAR ICE CREAM AND CREAMERY COMPANY,

Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

REPLY BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY

STATEMENT

The Appellant, Polar Ice Cream & Creamery Company, will hereinafter in this Reply Brief sometimes be referred to as Polar. Questions presented will not be repeated, but the Argument shall be divided by topical headings.

I. FLORIDA'S SCHEME FOR THE REGULATION OF MILK IN THE PENSACOLA AREA DISCRIMINATES AGAINST AND BURDENS THE FLOW OF OUT OF STATE MILK INTO FLORIDA, IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

In their attempt to defend the specific portions of the Florida Milk Control Law and rules of the Florida Milk Commission, whose constitutionality under the Commerce Clause has been questioned by Appellant, Appellees direct the major part of their argument to the establishment of the proposition that "milk control laws" as such are a valid exercise of the State's police power. Thus, for example, Appellees go to some length to point out that state statutes fixing minimum milk prices have been upheld on several occasions. (Brief of Appellees, pp. 18-20) In discussing **Lehigh Valley Coop v. United States, 370 U.S. 76 (1962)**, Appellees draw much comfort from the fact that, in their view, the "case actually expresses the continued support by the Supreme Court of the United States of regulations establishing minimum producer prices." (Brief of Appellees, p. 22)[1].

---

[1] Appellees also suggest that *Lehigh Valley Coop* v. *United States*, 370 U.S. 76 (1962) affords no support for Polar's contentions because it simply held that "the Federal Administrator exceeded the authority of the Congressional Act." (Brief of Appellees, p. 22) The *Lehigh* case did rest upon such a holding. But the Court held that the administrator exceeded his authority *because* the compensatory payment plan which was the subject of the controversy had the effect of "imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area." (370 U.S., at 98) and was therefore in violation of Section 8c(5)(G) of th Agricultural Marketing Act of 1937, a provision which "was compendously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers . . . . " (370 U.S., at 97) The basic issue in *Lehigh*, then, was the same as the basic issue involved in this case.

The validity of all parts of the Florida scheme of milk control, as such, is not the issue in this case. Polar recognizes that a State may, under its police power, regulate the milk industry for the purpose of assuring that its citizens have available an adequate supply of wholesome milk, but such regulations must be constitutional. What Polar does deny is that a state may, consistent with the Commerce Clause, adopt a scheme implemented by a combination of statutory provisions and administrative orders which allocates to its own producers all Class I sales up to the total amount of their deliveries, to the exclusion of producers supplying the same area but located in other states.

The issue presently before the Court, then, is whether the State of Florida may, under the guise of fixing producer prices, impose restrictions which are for the purpose and have the effect of favoring Florida producers, as opposed to producers located in other states.[2] Appellees' Brief, despite its extensive discussion of the power to regulate producer prices and the need for maintaining adequate sources of milk, never comes to grip with this simple but basic issue.

The Florida Milk Commission has established an allocation scheme which provides, in substance, that all of Polar's Class I sales, to the extent of the total deliveries made to Polar by Florida producers, shall be allocated to those producers, leaving only what, if any, remains of Class I, plus Class II, III and IV to be al-

---

[2] *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939), cited by appellees, is of no relevance to this issue, since the regulation questioned in that case did not discriminate against interstate commerce in favor of local producers and processors.

located to out-of-state producers. The Commission has implemented this discriminatory scheme by its enforcement of two Sections of the Florida Milk Control Law, Sections 501.05(3) and 501.09(3)(a), which have the effect of tying Polar to its Florida producers and which thereby forestall any attempt of Polar, by reducing its purchases of milk from Florida producers, to relieve itself of the crippling burdens resulting from the Commission's discriminatory allocation scheme. The allocation plan and these two latter statutory provisions are integral parts of a single regulatory scheme. They cannot be considered apart from one another.

It cannot be denied that on its face the allocation scheme discriminates against out-of-state producers. Appellees have made no attempt to deny this fact. Their only arguments in support of the scheme seem to be (1) that Appellant has remained free to "purchase milk from every state in the union and pay whatever price his negotiations might provide" (Brief of Appellees, p. 23); (2) that Polar "was regularly purchasing milk from the identical 'base earned producers' during the years that the Florida Milk Commission exercised no control" in the Pensacola area (Brief of Appellees, pp. 23-24).

It is true that neither the Florida Milk Control Law nor the rules of the Florida Milk Commission purport, on their face, to regulate the price of, nor limit the importation of, out-of-state milk. Yet this is clearly the effect of the entire scheme. As pointed out in more detail in Appellant's principal brief (Brief for Polar Ice Cream & Creamery Company, p 23), the allocation plan, coupled with Sections 501.05(3) and 501.09(3)(a) of the Florida Milk Control Law "put legal and economic pressure upon Polar to reduce its out-of-state purchases."

The fact that Polar may in a technical sense be free to negotate any price with out-of-state producers, is no answer to Polar's contentions. As Appellees have themselves pointed out, while it costs the producers the same amount to produce each gallon of milk, the distributor's return on his sales varies with his utilization. (Brief of Appellees p. 5). Class I, or fluid, milk sells at the highest price. The distributor receives correspondingly less for Class II, III and IV uses. It is for this reason that utilization pricing has been adopted in Florida. It is only the "blend" price that gives a producer a fair return, since the price which he receives for Class I milk is well above his cost of production, and the Class II, III and IV prices are below his cost of production. (Brief of Appellees, pp. 5-6) Thus, if a producer is required to sell a disproportionate share of his milk at Class II, III and IV prices, he will not be able to secure a fair return on his sales. This is precisely the position in which the Florida allocation scheme places out-of-state producers.

Freedom to negotiate prices under these circumstances is a hollow mockery. The scheme compels the out-of-state producer to sell the bulk of its milk for utilization for which less than the blend price is customarily paid.

Conversely, under the Commission's allocation scheme and Sections 501.05(3) and 501.09(3)(a) of the Florida Milk Control Law Polar must purchase its Class I milk from Florida producers. This insures a price to Florida producers substantially higher than the "blend" price.

In order to secure a fair return, Polar must resell this milk as fluid milk for Class I usage. While Polar can purchase Class II, III and IV milk from out-of-state producers, the inexorable laws of economics make

certain that these purchases must be at considerably less than "blend" prices if Polar is to process and sell milk at a competitive price in the Pensacola market.

The Florida Milk Commission and the Florida producers understand these economic facts. The assumption underlying the entire utilization pricing scheme which Florida has adopted is that Florida producers will get more than the "blend" price, while out-of-state producers must demand less if they are to sell any of their milk in the area.

Thus the statement that Polar may purchase from out-of-state producers at whatever prices it may negotiate means virtually nothing, for the prices at which it negotiates must be within the limitations imposed by the Florida utilization pricing scheme. Since Class I milk is allocated to Florida producers, Polar can purchase milk from out-of-state producers only at Class II, III and IV prices, prices at which out-of-state producers could not profitably sell. This is in economic fact an exclusion of out-of-state producers from the market.

Nor is it relevant that Polar regularly purchased milk from the identical "base earned producers" prior to the entry of the Florida Milk Commission into the Pensacola area. Before the regulatory scheme they were paid the "blend" price, nothing more. The effect of the allocation scheme, together with Sections 501.05(3) and 501.09(3)(a), is to require Polar to continue to purchase from these same producers but to pay more than the "blend" price. Certainly, the fact that Polar purchased from these producers on its own terms prior to the entry of the Milk Commission into the Pensacola area carries no implication that it can be compelled to continue to purchase from them on terms imposed by the Commission.

The basic and inescapable fact is that the Florida regulatory scheme deliberately and effectively discriminates against out-of-state producers in favor of Florida producers. This discrimination is a direct burden on interstate commerce between Polar and its out-of-state producers, and between all other Florida processors similarly situated and their out-of-state producers.

Not a single sentence in Appellees' Brief attempts to deny the fact of this discriminatory burden.

Furthermore, the inevitable economic and practical result of the discriminatory burden will be ultimately to exclude more and more out-of-state milk from Florida. Out-of-state producers simply will not, and cannot, continue to sell at prices which Appellees admit would be below their cost of production — and less than they can obtain on the free market elsewhere. Florida processors, who are compelled to pay Class I prices for Florida-produced milk, cannot pay a fair price to out-of-state producers whose milk they must utilize primarily for Class II, III and IV usages.

Appellees thus have not only failed to deny but by clear implication have admitted, that the Florida scheme imposes a discriminatory burden on interstate commerce. And Appellees have not even succeeded in advancing any reasons of expediency to justify the unconstitutional burdens thus imposed. Obviously, the fact that the Florida Statutes require the producer price to be fixed at such a level as to allow producers a fair rate of return does not, as Appellees seem to suggest (Brief of Appellees, Pages 5-7) justify discriminatory allocation. The Commission's remedy in this situation is to raise the producer price — not to seize all of the Class I sales for local producers.

A reading of Appellees' Brief therefore justifies the concluding comment that what is before this Court is nothing more nor less than a scheme intended to promote the economic interests of Florida producers at the expense of out-of-state producers whose milk must be shipped into Florida in interstate commerce. This is exactly the kind of favoritism by a state on behalf of its own citizens which the Commerce Clause was designed to forbid, to the end that the economic welfare of the people as a whole would be promoted by an untrammeled flow of commerce between all the states.

II. FLORIDA CANNOT ENFORCE HER MINIMUM PRODUCER PRICE REGULATIONS AS RESPECTS MILK SOLD TO MILITARY INSTALLATIONS, BECAUSE TO DO SO WOULD VIOLATE THE FEDERAL PROCUREMENT POLICY.

This Court, in the case of **Paul v. United States, 9 L. ed. 2d 292, 83 S. Ct. Rep. 426,** held that because of the Federal procurement policy, which demands that the fullest competition be had in bidding on Federal contracts, a State may not, by the enforcement of price regulations, eliminate competitors from bidding on government contracts.

The Court said:

> "While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law. * * * * The collision between the federal policy of negotiated prices and the state policy of regulated prices is as

> clear and acute here as was the conflict between federal negotiated rates and state regulated rates in Public Utilities Com. of California v. United States, 355 U.S. 534, 2 L.ed. 470, 78 S.Ct. 446, supra."

The question of the effect of the Federal procurement policy upon State regulated milk producer prices has not been squarely presented to this Court, but the matter arose in the case of **U. S. v. Warne, 190 F. Supp. 645**, which was the lower Court decision preceding **Paul v. United States.** Following the **Warne** decision, and prior to the time this Court granted certiorari to the **Paul** case, the government abandoned its attack upon California minimum producer prices. However, in a dissenting opinion in **Paul v. United States**, this proposition was considered by three members of this Court, who observed that the mere fact that the government changed its position and abandoned its attack on producers' prices was only a matter of governmental discretion. In his dissent, Mr. Justice Stewart remarked that:

> "... and it can hardly be contended that scheme of producer price maintenance would be any less in conflict with the Court's view of Federal procurement policy."

The remarks of the Justice would seem most pertinent to this question.

It is clear that by requiring Polar to pay no less than 61c a gallon for any milk purchased from a Florida producer for use in supplying a military contract, Polar's position as a competitor in bidding on government contracts is seriously impaired. Certainly, it would be of great advantage to Polar to utilize milk from Florida producers in the fulfillment of military contracts. Contracts with military installations de-

mand a large and constant supply of fresh raw milk, a supply which Polar would find most readily available from its nearby Florida producers. It is seen at once, however, that Polar cannot use Florida milk to fulfill a government contract when the winning bid for processed, packaged and delivered milk is considerably below the price Polar is required to pay the Florida producers for raw milk.

Another obvious interference with Federal procurement policy is the attempt by the State of Florida to enforce her distributor's privilege tax on milk sold to military installations situate on property, exclusive jurisdiction to which has been ceded to the United States. Although this particular proposition will be considered in more detail hereafter in this brief, it is seen at once that if Polar is required to process milk brought in from out-of-state (or even milk purchased from Florida producers) through the facilities of its plant in Florida, it must pay 15c per 100 gallons in distributorship taxes. This expenditure must be taken into account on its bids for government contracts and it is seen that its bidding position is necessarily affected in a manner prohibited by the doctrine of **Paul v. United States.**

III. FLORIDA CANNOT ENFORCE HER DISTRIBUTOR'S PRIVILEGE TAX ON SALES TO MILITARY INSTALLATIONS LOCATED ON PROPERTY TO WHICH EXCLUSIVE JURISDICTION HAS BEEN CEDED TO THE UNITED STATES.

In reply to the arguments of Appellees on the issue of the right of the State of Florida to enforce a distributor's privilege tax upon Polar, as respects milk sold to military installations of the United States, Polar submits that Appellees have failed to meet the issue. The question is not as Appellees' Brief indicates,

whether the State of Florida, by the collection of fees, can finance the inspection and regulation of Florida's milk industry. The question, rather, is whether sales and delivery of milk at military installations which are under the exclusive jurisdiction of the United States are to be included in fixing the tax to be paid by the milk distributor under §501.09 of **Florida Statutes.** As pointed out in Brief for Polar Ice Cream & Creamery Company (page 43), the case of **Standard Oil Company** v. **California, 291 U.S. 242, 78 L.ed. 775,** is clearly on point. Although in the **Standard Oil** case, the product being distributed was gasoline, whereas in the case at hand the product is milk, the law remains the same. A state does not have jurisdiction to impose taxes upon transactions conducted beyond its territorial boundaries. It cannot be denied that Polar's sales of milk to United States military installations were transacted on property over which the United States has exclusive jurisdiction. Neither can it be denied that the inclusion of these sales in fixing the amount of the tax to be paid to the State of Florida represents a tax on sales made to the United States.

A further objection to the imposition of the distributorship tax upon Polar is its effect upon Polar's position as a competitor for milk supply contracts awarded by the United States. As mentioned in this Reply Brief, (Page 8) the Federal procurement policy prohibits a State from enforcing regulations which have the effect of eliminating competitors from bidding on government procurement contracts. A distributor, such as Polar, which is required to pay the Florida tax of 15c per 100 gallons of milk processed for a Federal military installation cannot enjoy the same competitive position as out-of-state distributors which are not subject to this burdensome tax.

The three cases cited in the Brief of Appellees are not applicable to the case at hand. The case of **Pure**

Oil Company v. State of Minnesota, 248 U.S. 158, 63 L.ed. 181, and the case of **Texas Company v. Brown, 258 U.S. 446, 67 L.ed. 721,** (cited at Page 26 of the Brief of Appellees), do not involve the sale of any product to the United States, nor do they involve any sale consummated on property over which the United States has exclusive jurisdiction. The absence of these factors makes these cases clearly distinguishable from the case at hand.

The case of **U. S. v. Lee, 13 So.2d 919,** cited by Appellees, cannot be applicable to any decision in the case at hand. The facts of the **Lee** case fail to show that any sale was consummated on property over which the United States had exclusive jurisdiction.

CONCLUSION

Florida's milk regulatory scheme creates an economic barrier in violation of the Commerce Clause of the Constitution of the United States, and the fixing of minimum producer's prices for milk sold to Military installations, exclusive jurisdiction to which has been ceded to the United States, violates the Supremacy Clause of the Constitution, as does the attempt to levy a Florida State distributor's tax on the sale of such milk.

For the foregoing reasons, the Judgment of the District Court should be reversed with directions to enter a Decree granting appropriate relief to the Appellant.

JOE J. HARRELL, ESQ.,
201 East Government Street,
Pensacola, Florida

J. A. McCLAIN, JR., ESQ.,
Suite 615, Marine Bank Building,
Tampa, Florida
Attorneys for Appellant

PROOF OF SERVICE

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of October, 1963, I served a copy of the foregoing Brief on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, MALLORY E. HORNE, of Horne & Rhodes, 102½ South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida, and JOHNSON S. SAVARY, ESQ., Inverness, Florida, Attorney for Appellant.

JOE J. HARRELL,
Attorney for Polar Ice Cream & Creamery Company,
201 East Government St.,
Pensacola, Florida